KARL G. HEROLD*
DAVID D. KNOLL**

ARTICLES

Negotiating and Drafting International Distribution, Agency, and Representative Agreements: The United States Exporter's Perspective†

I. Introduction

1. DEVELOPING A UNITED STATES EXPORTER'S PERSPECTIVE TO INTERNATIONAL REPRESENTATION

Legal issues touching upon the appointment, conduct, and termination of international distributorship, agency, and representative arrangements are a regular part of the diet of international practitioners and courts. For example, the Federal Supreme Court of the Federal Republic of Germany recently reaffirmed that an agent who acts as a sales representative cannot be terminated without compensation even when the termination comes as a necessary incident of the reorganization of the principal's enterprise.[1]

*Partner, Jones, Day, Reavis & Pogue, Cleveland, Ohio.
**Associate, Jones, Day, Reavis & Pogue, Cleveland, Ohio.
†The Editorial Reviewer for this article is Kevin M. Harris.
The law cited herein is as available to the authors at December 1, 1986.

1. Judgment of January 30, 1986, Bundesgerichtshof, Karlsruhe, [BGH], W. Ger. I ZR 185/83, *noted in* BUS. L. BRIEF (Financial Times) June 1986, at 15.
Traditionally, discussion of international sales through independent local intermediaries commences with definitions of key terms such as "distributor," "agent"and "representative." The authors have however left the detailed definitional issues until Part II of this article preferring to review necessarily prior international business and practical contracting issues first.
In their combined experience, the authors have encountered a sargasso sea of labels for independent local intermediaries. As a practical matter, the two key roles are as follows: (1) the "agent," who usually does not bind his principal to a third party, seldom takes custody of goods, and contracts obligations towards only one party, his principal, the exporter; and (2) the "distributor,"who sells on his own account and often does take custody

In this case the principal suffered substantial losses through 1979 and two months later terminated the agreement with its sales representative upon approximately twenty days' notice. The sales representative claimed damages for failure to observe the ambiguous contractual notice period, and also compensation for loss of continued business with its customers. The sales representative won at trial, but was awarded lower damages than claimed. The principal appealed. The Federal Supreme Court agreed with the intermediate appellate court that a principal is free to reorganize his business as necessary, but insisted that the principal may terminate the agency agreement without proper notice only if such termination would be justified by consideration of the reasonable business interests of *both* the principal and the agent. The principal's corporate reorganization did not, of itself, justify termination without proper notice, particularly if the reorganization had been under consideration for a significant period of time. Consequently, the sales representative was entitled to compensation for its loss of potential business.

One can freely speculate how much litigation cost (as well as the damage award) could have been saved by the principal, had the principal not appointed an agent but rather established a distributorship. Also, the agency agreement failed to set forth a formula for determining appropriate consequences upon termination. Finally, the contract did not expressly authorize continued sales of the product by the principal after termination.

It is no surprise that the appointment and the termination are two of the most regulated, and most studied, areas of international agency and distributorship law.[2] There is also voluminous English language litera-

---

of goods. The distributor contracts obligations with both the exporter, from whom the distributor buys, and with the purchaser, to whom the distributor sells. When a distributor rather than an agent acts, the exporter does not contract with the foreign purchaser.

2. *See e.g.*, Bauman, *International Sales Representation and Distributorship Agreements*, 4 N.C.J. INT'L L. & COM. REG. 141 (1979); Johnson, *International Distributorship and Agency Arrangements*, in SOUTHWESTERN LEGAL FOUNDATION: NEGOTIATING AND DRAFTING INTERNATIONAL COMMERCIAL CONTRACTS 199 (1966); King, *Legal Aspects of Appointment and Termination of Foreign Distributors and Representatives*, 17 CASE W. RES. J. INT'L L. 91 (1985); Lando, *The Commercial Agent in European Law*, 1965 J. BUS. L. 179, 374, *reprinted in* 1966 J. BUS. L. 82; Muller-Freienfels, *Law of Agency*, 6 AM. J. COMP. L. 165 (1967); Muller-Freienfels, *Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty* (pts. I-IV), 13 AM. J. COMP. L. 193, 341 (1964); Puelinckx & Tielemans, *The Termination of Agency and Distributorship Agreements: A Comparative Survey*, 3 NW. J. INT'L L. & BUS. 452 (1981); Saltoun & Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S Exporters*, 38 BUS. LAW. 883 (1983); Schmitthof, *Agency in International Trade*, 129 RECEUIL DES COURS 115 (1970-I); Vanderhaeghe & Jones, *Current Developments in European Agency Law*, 12 INT'L LAW. 671 (1978). For an excellent discussion of United States distributorships gone sour and the resultant litigation issues, *see* Faruki, *The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations*, 46 OHIO ST. L.J. 925 (1985).

ture on specific countries' problems in the international representation area.[3]

The following discussion will not dwell upon the pathological mire of agencies and distributorships gone wrong, but instead will focus on the international corporate lawyer's role at the negotiation and drafting stages of these important relationships. The case just outlined simply serves to highlight the unfortunate consequences of insufficient or ineffective legal counseling at the time when international representation arrangements are created.

Before approaching various legal issues, it is important to analyze certain of the business considerations that might dictate one form of representative arrangement over another, and then to stress some of the elements of negotiating and drafting that set off international agreements from their domestic counterparts. The items listed in the next section are by no means exhaustive, but should provide a good basis to assure that critical factors are taken into account up front.

2. Business Considerations[4]

The Foreign Market

Prior to the involvement of any lawyers, it should be expected that the business executive in charge of any particular arrangement has carefully

3. *See, e.g.*, Antonetti, *Puerto Rico's Dealer's Act Fourteen Years Later*, 83 COM. L.J. 453 (1978); Baker, *Legal Problems of United States Exporters Selling in France*, 14 INT'L LAW. 79 (1980); Carbonneau, *Exclusive Distributorship Agreements in French Law*, 28 INT'L & COMP. L.Q. 91 (1979); Cartwright, *The New Saudi Commercial Agencies Regulation*, 16 INT'L LAW. 443 (1982); Cartwright & Hamza, *The Saudi Arabian Service Agents Regulation*, 34 BUS. LAW. 475 (1979); Finkelstein, *Legislative and Judicial Regulation of Exclusive Distribution Agreements in France*, 15 INT'L LAW. 539 (1981); Hayward, *Jurisdiction Under the Belgian Law on Termination of Exclusive Distributors: An Exercise in Conflicts of Law and Jurisdiction*, 14 INT'L LAW. 128 (1980); Homsy, *Agency Law in the Arabian Peninsula and North Africa*, 5 NW. J. INT'L L. & BUS. 296 (1983); Jones, *Practical Aspects of Commercial Agency and Distribution Agreements in the European Community*, 6 INT'L LAW. 107 (1972); Juncadella, *Agency, Distribution and Representation Contracts in Central America and Panama*, 6 LAW. AMERICAS 35 (1974); Leigh & Guy, *Exclusive Agency Agreements in the EEC*, 1 EUR. L. REV. 282 (1976); Lowden, *The Negotiation and Drafting of Commercial Sales Agreements in East Europe*, 29 BUS. LAW. 845 (1974); Meyer, *Terminating Sales Arrangements in West Germany*, 7 TEX. INT'L L.J. 233 (1972); Sales, *Termination of Sales Agents and Distributors in France*, 17 INT'L LAW. 741 (1983); Shamma & Morrison, *The Use of Local Representatives in Saudi Arabia*, 11 INT'L LAW. 453 (1977); Simons, *Termination of Sales Agents and Distributors in Belgium*, 17 INT'L LAW. 752 (1983); Sunt, *Distribution Agreements under Belgian Law*, INT'L FIN. L. REV., Feb. 1986, at 21; Swacker, *Dealer and Agent Relations: Avoidance of Common Pitfalls* in DOING BUSINESS IN LATIN AMERICA 95 (S. Stairs ed. 1985); Taylor & Weissman, *Middle East Agency Law Survey*, 14 INT'L LAW. 331 (1980); Vorbrugg & Mahler, *Agency and Distributorship Agreements under German Law*, 19 INT'L LAW. 607 (1985).

4. *See e.g.*, Johnson, *supra* note 2, at 202.

canvassed the relevant market through appropriate surveys and studies.[5] Thus, one should be able to assume that a demand for a particular product in fact exists. While these assumptions are not unreasonable, we consider it to be part of an effective international lawyer's role to assess diplomatically whether a client, before embarking on a costly international expedition, has in fact taken into account the many facets of a sensible foreign investment.

The Structure of the Proposed Investment

Aside from distributorship or agency relationships, the business executive should weigh the benefits and disadvantages of creating a permanent establishment overseas, of setting up branches or warehouses, of possibly joint-venturing the manufacture or distribution of a particular product (such as taking an equity position in the foreign representative's entity), or of creating foreign subsidiaries. Many of the considerations for an appropriate structure are naturally affected by legal and tax concerns. The ultimate determining factor, however, should generally be the client's long-term business objectives. Thus, one of the key questions we usually ask our clients is what their business expectations and objectives are three, five, and eight years down the road. Most of the time legal considerations can be blended into each client's long-term business expectations.

The Foreign Representative

Assuming that, based on a consideration of all relevant factors, the client has rejected the creation of a foreign branch or subsidiary, then the next question is whether to appoint a distributor or an agent in the foreign jurisdiction. Aside from the legal issues discussed throughout this article, the client should consider:

1. The amount of control that it is desirable to exercise over the foreign representative, and the client's own long-term objectives in any particular geographical market or area. The identification of a foreign representative must generally be left for the client, although it may be worthwhile to determine whether, subject to applicable antitrust or competition laws, the client has considered the appointment of a competitor or of one who markets complementary (as opposed to competitive) products.
2. Issues of customer contacts, such as the desirability of reserving direct sales by the manufacturer, whether generally or to specific

5. Comprehensive background on the foreign markets being approached can be found in the Department of Commerce series *Overseas Business Reports*, which reviews the prospects for American business abroad on a country-by-country basis.

accounts. Is a local distributor in a better position to create favorable impressions with the ultimate purchasers and the host country, and thereby enhance the likelihood of success in a particular market? In this connection the manufacturer should also consider whether to grant the representative the right to appoint sub-representatives.

3. Strengths and weaknesses of the foreign representative's personnel, including ability to promote the products and canvass the remaining market, necessary technical training, and ability to service products post-sale. When the proposed representative may not quite measure up to the client's expectations, consideration should be given to the representative's willingness and potential for recruiting needed personnel. Also, additional personnel may be required to expand the market, and the client should consider the availability of such competent personnel in the local labor market.
4. Complexity of the relevant product in view of local market conditions, competence of the representative's personnel, and educational stature of the ultimate consumers in the local market.
5. The financial capacity of the foreign representative. This criterion is obviously key to whether the representative should be exclusive or nonexclusive. Financial strength is often required to meet local competition and store sufficient inventory to meet the fluctuating demands of what it is hoped will be an expanding market. Also the availability of local investment incentives should be considered.
6. The representative's enthusiasm and objectives for the future. Do the objectives correspond to the manufacturer's expectations? If any aspect of the representative's qualifications is questionable, the manufacturer should assess the availability (present and future) of competent alternative representatives.
7. The need for sophisticated machinery and equipment to service customers' needs post-sale.
8. The desirability of strong intellectual property protections.

These are all matters that must be carefully weighed in deciding whether to appoint a representative, an agent, or a distributor. A note of caution is in order here. In their nationalism, many courts will strain to apply their country's protective legislation to representative arrangements. Thus, on the one hand a court might conclude that, irrespective of what a representative is called, whether agent or distributor, the substance (translated most often into the degree of control exercised by the manufacturer over the representative) and not the form of a particular relationship will determine whether the representative is, in law, an agent or a distributor. On the other hand, calling a distributor an agent in the agreement, as well as in subsequent communications, may be sufficient for the representative, although really a distributor, to seek and find protection under his coun-

try's agency protective laws. Clearly, the exporter should be consistent in all his communications with the representative.

Reasonableness and Fairness

Above all, in any long-term relationship, matters of fairness, reasonableness, and trust are the sine qua non of creating the necessary atmosphere to give any project that involves other players the best possible chance for success.

3. Some Basic Comparative Contract Law Issues

Some basic comparative contract law issues often surprise American manufacturers seeking overseas distribution. For example, some civil law countries require that an offer remain open for a statutory period of time unless a different period is stipulated in the offer. In Mexico this period is three days plus mail turnaround time. Acceptance issues can also surprise. Most civil law countries put the time of acceptance not when the offer is put in the post, deposited, or filed, but rather when it is received by the offeror.[6] This and other comparative law problems can be reduced partially by contractual incorporation of the United Nations Convention on the International Sale of Goods[7] (the Sales Convention) and/or INCOTERMS.[8] Note, for example, that while the Sales Convention follows the civil law rule that a contract is concluded when notice of acceptance reaches the offeror, it follows the common law rule that an offeror may not revoke an offer once an acceptance has been dispatched. It is important to point out, however, that unexpected dangers may be lurking when the Sales Convention is incorporated by reference, although it can be adopted privately as well as nationally.[9] Note should also be made of the provision in article 16 that an offer will be deemed irrevocable if it is reasonable for the offeree to rely on its being irrevocable and the offeree acts in reliance on the offer, even if the offer does not contain language indicating irrevocability.

---

6. *See e.g.*, Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 Colum. L. Rev. 920 (1936).

7. U.N. Doc. A/CONF.97/18, Apr. 10, 1980, *reprinted in* 19 I.L.M. 668 (1980) [hereinafter Sales Convention]. *See generally* J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (1982); International Sale of Goods (Dubrovnik Lectures) (P. Sarcevic & P. Volken eds. 1986).

8. International Chamber of Commerce, Incoterms (2d ed. 1980).

9. The United States was the ninth nation to ratify the Convention on October 9, 1986. That ratification became effective on December 11, 1986, along with the ratification of Italy and the accession of the People's Republic of China. The Convention takes effect in United States law, January 1, 1988. It now seems likely that a great many countries will ratify.

The Sales Convention represents the sum total of lengthy negotiations between sixty-two countries, and as a result incorporates a great number of common as well as civil law concepts. As a consensus document, it disguises as many conflicts of legal methodology as it resolves conflicts of substantive law. Thus, it is a potential trap for the unwary. Furthermore, the Sales Convention does not apply to the sale of services or an arrangement in which services play a preponderant role over the sale of goods, and contains no Statute of Frauds (thus oral agreements are as enforceable as written ones)[10] and no requirement for consideration (although the offerer can, of course, require consideration and a written agreement in the terms of the offer). American lawyers unfamiliar with civil law concepts or with the terms of the Sales Convention should not be surprised that disputes might not necessarily be resolved as they would be under common law notions. Certainly, the Sales Convention, if incorporated into a particular offer, is likely to result in the formation of fewer contracts because the Sales Convention requires the terms of an acceptance to conform more strictly to the terms of the offer, except where alterations are not material.[11] Once the Sales Convention becomes effective, great care must be exercised to explicitly contract out of the Sales Convention in whole or in part, if that be desired,[12] since the Sales Convention applies by its terms to contracts between two parties who have places of business in different states party to the Sales Convention[13] or where the conflict of law rules of a state lead to the law of a state party to the Sales Convention.[14]

In respect of the incorporation of INCOTERMS, the draftsman must, of course, be aware that INCOTERMS deals principally with the apportion-

10. Sales Convention, *supra* note 7, art. 11.

11. *Id.* art. 19; *cf.* U.C.C. § 2-207 (1982). Although, on this point, the Sales Convention closely parallels the legal position in common law countries other than the United States.

12. Sales Convention, *supra* note 7, art. 6.

13. *Id.* art. 1(1)(a). Under the Sales Convention, parties are free to choose to exclude the applicability of the Convention or any part thereof. *Article 6, however, requires that they must do so expressly.* In comparison, under U.C.C § 1-201(3) (1982) such an agreement to derogate from its mandate can be implied.

14. Sales Convention, *supra* note 7, art. 1(1)(b). States, in adopting the Sales Convention, may reserve against the applicability of art. 1(1)(b) to avoid the inadvertent applicability of the Convention. In accordance with art. 95, the United States did adopt a reservation against the applicability of art. 1(1)(b). Therefore, the Sales Convention can only apply to United States parties when their foreign contracting partner is a national of another Sales Convention country. *See* Honnold, *Uniform Law for International Sales—the 1980 U.N. Convention*, in 1984 ASIAN PACIFIC REGIONAL TRADE LAW SEMINAR 181, 185-90; Pelichet, *The Hague Draft Convention on the Law Applicable to Contracts for the International Sale of Goods, id.* at 299.

ment of risk of loss of goods in transit, the passage of title to the goods, and the costs of transportation, custom duties, and insurance. An international contract for the sale of goods should contain many more provisions than would be supplied by the mere incorporation of INCOTERMS.

Moreover, returning to comparative law issues, civil law systems generally do not accommodate the concept of an agent acting for an undisclosed principal. On the other hand, under common law notions a duly authorized agent (or one with the requisite apparent authority) may close a contract between principal and third party even though the third party is unaware of the identity of the principal. The agent can thereby bind the principal and third party, but not itself. In civil law systems the same facts have different legal consequences. Two separate, independent contracts exist. The agent and third party bind each other, while the contract between the agent and its principal remains apart. There is no contract between the principal and third party. Many continental commission agents operate this way. To tie the principal and third party contractually, a separate assignment is needed.[15] The agent and third party must specifically contract to assign rights to the principal to enforce the arrangement if and when the principal is disclosed.[16]

Implied warranties in civil law systems tend to be somewhat broader than under the common law. If warranties of merchantability and fitness for purpose are to be given, it should be recognized that these warranty terms are terms of art within the framework of national systems and have no generic international meaning. Consequently, contractual choice of law will have a significant impact on the warranties being given.

Force majeure is another doctrine that is quite differently interpreted under various national legal systems. Parties should not incorporate force majeure as a presumably understood term in their contracts. Both the acceptable impediments, and consequences upon the existence and/or certification of such impediments, should be spelled out line by line. A clause that gives parties discretion to claim force majeure may even be unenforceable under some civilian codes. In Brazil, for example, definite limits, both substantive and procedural, are conditions of enforceability.[17]

15. The exterior relationship between principal and agent on the one side and the third party on the other is the focus of the Convention on Agency in the International Sale of Goods, done at Geneva, Feb. 17, 1983, *reprinted in* 22 I.L.M. 246 (1983) (draft prepared by the International Institute for the Unification of Private International Law (UNIDROIT)). *See* Evans, *The Geneva Convention on Agency in the International Sale of Goods*, in 1984 ASIAN PACIFIC REGIONAL TRADE LAW SEMINAR 250. Adoption of the Convention is under consideration by a number of countries, particularly as the Convention is designed to supplement the Sales Convention.

16. *Accord* Schmitthof, *supra* note 2, at 140.

17. Brazil - CÓDIGO CIVIL [C.C.], arts. 115 & 1125; *see* de Carvalho & Powers, *Drafting Contracts under Brazilian Law: A Practical Guide to Enforceability*, 14 INT'L LAW. 115, 120 (1980).

Remedy issues are also impacted by the choice of law and by the choice of forum. Many legal systems consider remedy issues to be procedural issues governed by the law of the forum rather than the substantive law of the contract. Consequently, civil law concepts of damages, rescission and restitution need to be examined. Continental legal systems often prefer specific performance over damages, whereas common law systems have a preference for granting damages as the more appropriate remedy in most cases.

Irrespective of the foregoing, in the practical trading world of the western hemisphere (and significant portions of other hemispheres as well) the course of international dealings and usages of trade often supply the requisite ingredients to supply missing terms or to assure the fair resolution of disputes as to contractual interpretation.[18] Thus, despite the differences in the numerous legal systems throughout the world, international usage of trade provides some comfort against wholly unexpected and undesirable consequences. The clearly preferred alternative, of course, is to spell out all important terms of a contractual relationship to avoid the incorporation of unanticipated usages of trade.

4. Clarity and Precision in International Agreements

While the laws in the contracting parties' respective countries may, on some occasions, be similar, their cultural and business backgrounds may lead them to interpret the same words differently. Spelling out definitional issues reduces the risk that any differences of interpretation will lead to difficulties down the line.

One cannot stress enough the need for clarity and precision in drafting documents for use in international transactions. International litigation or arbitration seldom provides a satisfactory solution to contractual disputes. Clarity and precision lead to predictability, which in turn leads to effective dispute prevention in all but the most egregious cases. Even basic concepts should be spelled out so that the contracting parties are all the more certain to have the same understanding and interpretation of contractual terms. The "meeting of the minds" must clearly be set forth at the outset even if certain issues are rather painful or difficult to raise, negotiate, or express. The lawyer's role here can be invaluable in alerting the parties to potential pitfalls or oversights, and then precisely recording the parties' intentions on paper. If the intentions are clearly set forth, subsequent disputes are likely to be resolved within the four corners of the agreement. If the agreement is ambiguous, much extrinsic evidence may need to be produced to determine the parties' intentions.[19] The needed extrinsic

18. *See, e.g.*, U.C.C. § 2-207 (1982); Sales Convention, art. 9.

19. "[I]t is their intention as it existed at the time the contract was executed which must

evidence is often unavailable after several years of a good relationship.

5. Choice of Law and Choice of Forum

As the network of trading nations becomes more complex, there is a growing trend towards respecting exclusive choices of law and of forum in contracts, and the invocation of such a clause creates a certain level of predictability to dispute resolution problems in international contracts.[20] From a psychological perspective, it has often proven the case that when contractual provisions are clear and unambiguous, and therefore the parties' obligations predictable in all respects, disputes will not arise because this high level of predictability will lead parties to accept their responsibilities (no matter how painful subsequent circumstances) or find alternative amicable resolutions. For those disputes that do require adjudication, however, parties should know in advance what law will apply to settle their differences, and which forum will be applying that law.

The governing law clause should include a provision stating a choice of law and also a choice of forum, and should explicitly provide that these choices are exclusive. Nonexclusive choices, and clauses silent as to exclusivity, risk being treated by courts as merely hortatory. They import less predictability into the contractual dispute resolution process than exclusive choices. Parties should be advised to select the law of a country, state, or province that has substantial contact with the agreement and its performance. This increases the chance that the clause will be effective.[21] It may also be wise to arrange for the agreement to be signed by the United States exporter in the jurisdiction whose law is to govern, after it has first been signed by the foreign representative. Nevertheless, on issues

---

control rather than any subsequent intention tailored to complement an individual's posture once an agreement has gone sour." New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 127 (S.D.N.Y. 1980).

20. *See, e.g.*, Rome Convention on Law Applicable to Contractual Obligations, June 19, 1980, signed as of April 1, 1983, by Belgium, Denmark, France (ratified), Ireland, (Italy), Luxembourg, Netherlands, United Kingdom, and West Germany, 3 Common Mkt. Rep. (CCH) ¶ 6311 (1980); *see generally* Nanda, *Forum-Selection and Choice-of-Law-Clauses in International Contracts* in The Law of Transnational Business Transactions § 8.02(1)(e) (1981); Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 Int'l Trade L.J. 311 (1978).

21. Under Uniform Commercial Code principles, contracting parties are free to choose the law of a particular jurisdiction to govern their relationship, provided the transaction bears a reasonable relation to the selected state. U.C.C. § 1-105(1982). The Sales Convention contains no such requirement. It will apply irrespective of the lack of any nexus if its jurisdictional requirements are met. Indeed, for contracts between nationals of Sales Convention countries, a selection of either nation's law (or, in a federal construct, of the law of an internal state or province) will invoke the Sales Convention. If the contracting parties desire to exclude applicability of the Sales Convention, they must do so expressly.

of important public policy, foreign courts often assert jurisdiction.[22] The only preventive medicine available for unwelcome assertions of jurisdiction is to prepare a balanced and fair construct for the representation and thus limit, as far as practicable, the scope of judicial attack.

In almost all common law jurisdictions, both choice of law and choice of forum clauses will be respected. Western European nations also generally take a permissive approach to contractual choices of law and forum.[23] Still, a great many nations such as Argentina, Colombia, and Costa Rica adopt a very nationalistic approach to jurisdiction. The Belgian distributorship law[24] and the Costa Rican agency law[25] exemplify nationalistic approaches. Except for necessary compliance with the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[26] disputes concerning the termination of Belgian distributors will be resolved by the Belgian courts under Belgian law regardless of any choice of forum, choice of law, or preference for arbitration exhibited in the contract appointing the distributor.

Regardless of whether the foreign jurisdiction presently recognizes and respects choices of law and forum, both clauses should be included in foreign representation agreements. Where these clauses exist, and exclusively select a law other than the law that was applied, or a forum other than the forum that heard the dispute, United States courts might be persuaded not to recognize and enforce judgments against United States

22. For example, many states do not permit the exclusion of distributor/agent protective laws. If a distributor/agent is appointed in such a jurisdiction, the distributor/agent protective laws of that jurisdiction apply irrespective of a contractual provision selecting the laws of another jurisdiction more favorable to the exporter. *See infra* text Part III.

23. *E.g.*, Judgment of Sept. 23, 1971, BGH 8th civ. sen., W. Ger., 57 BGHZ 72, 75; CODICE CIVILE [C.C.] art. 25 (Italy); Williams, *The EEC Convention on the Law Applicable to Contractual Obligations*, 35 INT'L & COMP. L.Q. 1 (1986); Zaphiriou, *supra* note 20, at 315-16.

24. Belgian Law of July 27, 1961, on the Unilateral Termination of Exclusive Distributorship Agreements of Indefinite Duration, Moniteur Belge, Oct. 5, 1961, *as amended by* Law of Apr. 13, 1971, Moniteur Belge, Apr. 21, 1971, art. 6.

25. Costa Rica Law No. 6209 of Feb. 24, 1978, *as amended by* Executive Decree No. 8599 of May 5, 1978, art. 7; *accord* Puerto Rico Civil and Commercial Codes, *as supplemented by* Act No. 75 of June 24, 1964, *amended by* Act No. 104 of June 28, 1965, *as amended by* Act No. 105 of June 23, 1966, P.R. LAWS ANN., tit. 10, §§ 278-278(d) (1975 & Supp. 1985); *see also* Pan Am Computer Corp. v. Data General Corp., 467 F. Supp. 969 (D.P.R. 1979) (the court rejected the plaintiff's choice of law in derogation of the protection in Puerto Rico's dealership statute).

26. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *opened for signature* Sept. 27, 1968, 15 O.J. EUR. COMM. (No. L 299) 32 (1972) (entered into force Feb. 1, 1973), *as amended* to accommodate the accessions of new member states, 21 O.J. EUR. COMM. (No. L 304) 77 (1978), Denmark-Ireland-United Kingdom, 25 O.J. EUR. COMM. (No. L 388) 1 (1982), Greece (Spain and Portugal are presently arranging their accessions), *reprinted in* 18 I.L.M. 8 (1979), 3 Common Mkt. Rep. (CCH) ¶ 6003.

exporters.[27] This helps only United States exporters whose attachable assets are located solely within the United States. When a foreign judgment can be satisfied from moneys due from a foreign representative this precaution is of no real value, because such moneys constitute assets in a foreign jurisdiction that are clearly attachable.

To strengthen choice of law and forum provisions, United States exporters should insist that their foreign representatives submit to the jurisdiction of the courts in one of the states of the United States.[28] Such submission clauses are difficult to negotiate, but are useful in obtaining judgments in the selected forum, with the objective of obtaining registration and enforcement against the foreign representative in the foreign representative's country.

6. Choice of Language and Continuing Communications Issues

International agreements are very often translated into two or more languages. Therefore it is crucial to provide explicitly which language version of the contract should control irrespective of subsequent translations and reliance by the parties on such translations. Furthermore, international agreements should adopt an explicit controlling language for future communication, especially where more than one language is apt to be used. Assuring future effective communication and information exchange will not only avoid unnecessary disputes, but more importantly, will help to cement a valuable business relationship. Personnel may change, and replacement personnel may have different language facilities. If any doubt exists between the parties as to the best mode of communication, disputes on more substantive issues also are sure to occur.

In making a choice of language, the language selected should be the language of the forum selected in the choice of forum clause. Common sense may seem to require this choice, but even advanced western European courts may misinterpret an English language contract in favor of the European representative. If English is used as the language of contract, the forum selected should be an English-speaking jurisdiction.

---

27. Restatement (Second) of Conflict of Laws §§ 105, 117 (1964); Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 417 (1980 & Supp. 1986). *See generally* Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Int'l Law. 425 (1982); Juenger, *Federalism: Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 Mich. L. Rev. 1195 (1984).

28. *See, e.g.*, N.Y. Civ. Prac. L. & R. § 327 (McKinney 1972 & Supp. 1987). Since 1984 New York's forum of convenience rule permits parties to big commercial contracts for a consideration of at least $250,000 to choose New York law irrespective of the nexus of the transaction to New York for controversies of more than $1 million.

Notice clauses also should reflect the customary means of communication between countries. Between, say, Japan and the United States, the first class airmail is fairly efficient and a notice clause can simply be permissive, although we would not recommend it. Where the mail is unreliable, for example, in Australia and in Canada, the notice clause should deem that notice has been given after the lapsing of a mutually agreeable time period.

7. Confidentiality Issues

A representative should undertake not to disclose, and to prevent its employees, assignees, subcontractors, or agents from disclosing, any confidential information acquired during the course of its relationship with the exporter, and for a reasonable time period afterwards. It is imperative that this clause explicitly state that it is to survive the termination of the agreement. In many developing countries, such as Peru, Colombia, Venezuela, and the other members of the Andean Pact, confidentiality clauses may be ineffective to the extent they may apply to technological information that is deemed to have transferred outright to the foreign distributor after the expiration of a specified number of years.[29]

Establishing clear procedures for obtaining prior permission for making disclosure to an affiliate or third party will work better than a constructive knowledge standard. Where confidentiality is of real importance, as it so often is, the parties' peace of mind is best secured by providing a clear, workable procedure for the protection of confidentiality. The most effective procedures will change from case to case, depending on the parties' relationship, the applicable law, the type of information to be kept confidential, and the sophistication of the market.

8. Good Faith

Good faith should be a concept that needs little discussion, but should permeate every facet of an international commercial relationship. When the selection of the foreign representative is the result of a careful and meticulous process, the consistent application of the principle of good faith in dealing with the foreign representative will translate directly into desirable bottom line results ninety-nine percent of the time. Both the Uniform Commercial Code and the Sales Convention, and for that matter most local laws throughout the world, impose equitable conditions of good

29. For Andean Pact countries, this period may not be greater than that of the industrial property rights granted by the respective law. *See* Decision 24 of the Commission of the Cartagena Agreement, *as amended*, Andean Foreign Investment Code, Dec. 31, 1970, *translated in* 11 I.L.M. 126 (1972).

faith in respect of the contractual performance, interpretation, and enforcement of contractual provisions.[30] Such desirable virtues and qualities as a representative's loyalty, dedication, trust, and reliability can hardly be expected in a commercial relationship devoid of good faith. Lawyers who pride themselves in having pulled the wool over the other side's eyes by having been able to slip a favorable and often totally one-sided and overreaching provision past the "opponent," are not serving their client well in his desires to cement a strong, long-lasting commercial relationship.

Even though the laws of the many jurisdictions in the free world differ in some respects, there is a common underlying sense of justice and fairness to all. The laws of the jurisdictions in the free world generally reflect the mores of the particular society. The principle of good faith is universally known and respected. If a client desires to do business in a foreign jurisdiction, he should be willing to abide by the confines of the applicable laws of that jurisdiction, unless the contracting parties, within the confines of such laws, through good faith negotiations, exercise their freedom of contract and subject their relationship to different laws or agreed principles.

II. Appointing Foreign Representatives

9. Agent, Distributor, or Representative: Some Guidelines for Effective Choices

The United States exporter selling abroad will inevitably be faced with the decision of how to organize foreign sales.[31] In the context of this discussion focusing on distribution, agency, and representation agreements, the possibilities of setting up subsidiary operations or a representative office of the exporter in a foreign country will be left for another day. Assume that our hypothetical exporter has decided that a local, well-positioned third party will be hired to market the products in one or more countries. The third party can be a distributor, commercial agent, commission agent, or salesperson. We are not here concerned with salespersons who are employees of the exporter, but now define each of the other categories that do form the subject-matter of this article. As a preliminary matter, the label or name by which a foreign representative is addressed in the agreement, and in the course of the business relationship, is very likely to impact a court's conclusion as to the legal relationship between exporter and representative and the consequences of that relationship, particularly where such labels lead to the application of representative

30. U.C.C. § 1-203 (1982); Sales Convention, *supra* note 7, art. 7(1).
31. *See supra* text section 2.

protective laws. Bothersome as the distinctions between these labels are to the business world, the labels used do incur different legal consequences in different national legal systems. Although we make illustrative references to foreign laws, we do not provide any overall country specific analysis. Consequently, the following definitions have general utility, but have no special claim to eminence.

Agents stand in an ongoing contractual relationship with their principal to intermediate between the principal and third parties. In civil law jurisdictions, we have noted that the commission agent does not bind an undisclosed principal. Prudence dictates that agents receive either a precise and finite authority to bind the exporter as principal or a precise denial of authority. Inter alia, the agent's mandate should specify whether the agent is or is not authorized to receive payments. In Switzerland, for example, agents may conclude contracts but do not deal with payments.[32] Note that a mandate to bind can result in the exporter being subject to taxation in the foreign country. The exporter may be deemed to have a "permanent establishment" there.[33]

Agents may or may not be entrusted with the custody of an exporter's products, but though they might take custody, the exporter remains the owner of the products until the products are sold to a purchaser. Agents who introduce buyers and sellers but take no part in contract formation are mostly described either as brokers or representatives.[34] This article discusses the foregoing categories of agents without distinction.[35] Their separate features do not bear heavily on the negotiation and drafting of international agency agreements.[36]

A distributor, on the other hand, sells in his own name and for his own account. Although the distributor has an ongoing contractual relationship with the exporter, the distributor purchases goods from the exporter and then resells them. The exporter will generally give the distributor an

32. SCHWEIZERISCHES OBLIGATIONENRECHT, CODE DES OBLIGATIONS, CODICE DELLE OBLIGAZIONI [OR, Co, Co] art. 418e (Swiss).

33. *See infra* text section 26.

34. In the Middle East, "Sponsors" are used regularly. For a commission that is normally less than the commission paid to a commercial agent, a sponsor legitimizes the presence of a foreign seller in a particular country. Goods are imported in the name of the sponsor, but business is conducted directly by the principal by means of a "commercial establishment" bearing the name of the sponsor. Unlike the foreign commercial agent, the sponsor is not really a part of a United States manufacturer's international marketing effort.

35. Some agents are known as *del credere* agents. *Del credere* agents act as surety to the exporter by guaranteeing payment by the purchaser, but the *del credere* agent does not contract for himself. Whereas the distributor is always liable for the price of the goods to the exporter, the *del credere* agent is only liable if the ultimate purchaser does not pay.

36. Of course, if the principal is to remain undisclosed to purchasers, then the agency agreement should make the agent a *del credere* agent; otherwise the exporter will have no one against whom to enforce its unexecuted sales agreements.

exclusive or preferential right in a particular market or geographical area, although nonexclusive distributorships are quite common.

Among all these descriptions lies a basic distinction between agents and distributors. Distributors independently contract for themselves for the purpose of resale.[37] Distributorship agreements should contain terms governing actual sales by the exporter to the distributor. We here distinguish agents, who incur no liability for themselves. Unlike distributors, whose income is determined by independent price setting, the agent depends for his income on a commission agreed to between himself and the exporter. The distributor takes the risk of its customers not meeting their bills, whereas the agent engages customers but leaves the risk of nonpayment with his principal, the exporter. Consequently, an agency agreement, unlike a distributorship agreement, need not cover terms for sales of goods since the sales contract is between the exporter and the ultimate purchaser.

Perhaps most importantly, the distributor is an independent merchant, whereas the agent operates according to the policies and under the supervision of the principal. To a United States exporter wishing to control and direct traffic in its goods overseas, an agency relationship makes good business sense. The exporter, however, to whom such control over foreign sales is of less importance, and who would prefer to avoid the attendant business risks of acting as a principal in an overseas jurisdiction, may prefer a distributorship.[38]

The appointment clause should deal explicitly with the relationship between the parties. For example, a distributorship may be exclusive or nonexclusive, and the exporter may permit the distributor to appoint subdistributors to aid the distributor in the sales of the product in the territory. The relationship between distributor and exporter must be clearly stated and distinguished from the relationships between principal and agent, sales representative, and employed salesperson if the parties are to seek the legal benefits of distributorships. The agreement should be written to reflect a distributor's independence.

Some operational differences also exist between agency and distributorship. For example, a distributor has two sets of invoices, one for purchase of goods from the exporter and one for resale to the ultimate customer. The agent has one invoice that evidences a sale by the exporter to the

37. Distributor is a person who bears the economic risks of his selling activities. Notice on Contracts for Exclusive Representations Concluded With Commercial Agents, Dec. 24, 1962, 2 Common Mkt. Rep. (CCH) ¶ 297 (1971); *accord* T.W. Lamb & Sons v. Goring Brick Co., (1932) 1 K.B. 710, 716-22.

38. Taxation, antitrust, and intellectual property law issues also impact the choice between agency and distributorship. These issues are generally beyond the scope of this article, although we outline some important concerns in the concluding sections.

ultimate purchaser. An agency agreement should specifically set out the nature and extent of any agent's authority to bind the exporter and/or to receive payment on the exporter's behalf, or, alternatively, the exporter's right to accept or reject orders. In order to be effective in most jurisdictions, the right to reject orders must be absolute. A reservation of the right to reject orders should not be coupled with an agent's authority to bind the principal in any respect. Such a coupling will inevitably be confusing.

Of course, agencies and distributorships also have much in common as noted in 1966 by the European Court of Justice in the *Sarl and Grundig* case:[39]

> Plaintiff Grundig contends that the function of an exclusive distributorship agreement in international trade is to create new competitive relationships by enabling the producers of one country to take part in competition beyond that country's national frontiers. In international trade, a producer selling abroad must assign the task of distributing its products and defending its interests to a responsible representative who knows his market and who has the necessary means. Therein lie the meaning and the economic justification of the exclusive distributorship which remain the same regardless of the legal form of the sales organization chosen in each case by the producers, be it that of a branch, an agency or an independent dealer. There is therefore no justification for treating these various types of sales organization systems differently.

Notwithstanding the European Court of Justice's perspective, European statutory protection exists for agencies, but not distributorships, in all countries except Belgium where the reserve is the case. For purposes of this article, we distinguish between agents and distributorships as necessary. Where the discussion applies to both agents and distributors, we use the term "representative" to describe both major categories. Calling a distributor an agent in Belgium with the hope of circumventing the Belgian law for the protection of distributors is unlikely to be effective. The reverse is true in jurisdictions that have adopted laws for the protection of agents. The degree of control over the representative that the contract grants to the manufacturer and the degree of control actually exercised, as well as the degree of authority granted to the representative and the degree of authority actually exercised, will be the controlling factors that determine a representative to be either a distributor or an agent.

39. Etablissements Consten-Sarl and Grundig-Verkaufs-GmbH v. EEC Commission (Joined Cases 56/64 and 58/64), [1966] E.C.R. 299, [1961-1966 Transfer Binder Court Decisions] Common Mkt. Rep. (CCH) ¶ 8046, at 7641. This case arose in France. Grundig forbade its distributor, Consten, to sell outside France and similarly restricted each of its other European distributors from selling outside each distributor's respective territories. The ECJ struck down this "absolute territorial protection" as a violation of article 85 of the Treaty of Rome.

10. Registration and Other Threshold Requirements

As a preliminary matter, counsel should advise the United States exporter that it may not always be possible to appoint a foreign representative. This is so especially in Arab countries. Algeria, for example, prohibits the use of a representative.[40] Direct selling must be undertaken, and Algeria thereby assures that the United States exporter will be "doing business" in Algeria if it wishes to sell there. This exposes the United States exporter to the jurisdiction of the Algerian courts and to Algerian taxation.

Other countries, particularly in the Middle East, forbid the use of a foreign national as a representative. Abu Dhabi, Bahrain, Egypt, Indonesia, Iraq, Jordan, Kuwait, Pakistan, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and the Yemen Arab Republic apply this policy.[41] Socialist systems pursue a similar goal even more stringently. In some Middle East countries the government may "unofficially" designate a specific agent for the exporter in contracts with the government. Obviously, this raises significant and difficult Foreign Corrupt Practices Act issues.[42] Of the Middle East nations that require a representative to be a local national, Saudi Arabia prohibits direct sales, and further requires that a local representative be used to make all sales.[43] In the other coun-

40. Algerian Law No. 78-02 of 1978 and Regulations of Circular No. 09-CAB of Mar. 27, 1982. Certain "nonintermediary" activities are permitted, e.g., (a) assemblers, general contractors, combined export managers, (b) forwarders, (c) foreign export-import firms, and (d) representatives dealing solely with Algerian government agencies. Iraq, Syria, and Saudi Arabia prevent the use of agents for government procurement to varying extents. In Iraq the Minister of Trade must approve each agency relationship. Law No. 11/1983, art. 9. Government bodies may not deal with agents without the Minister of Trade's permission.

41. For Abu Dhabi see United Arab Emirates (U.A.E.) Federal Law No. 18/1981, arts. 3, 9 & 10, Law No. 11/1973; Decision No. 25/1979. *See also* Bahrain, Commercial Agencies Law, Amiri Decree No. 23 of 1975, *as amended by* Amiri Decree No. 13/1980, and *as supplemented by* Ministerial Orders Nos. 9/1981 and 17/1986; Egyptian Law No. 120/1981 of Aug. 5, 1982 (in force since May 5, 1982); Indonesian Ministerial Decree No. 314/Kp./XII/70 and Decree No. 78/Kp./III/78; Iraqi Law No. 11 of Jan. 31, 1983; Jordanian Law No. 20/1974, art. 4, *as amended by* Law No. 23/1979 effective May 16, 1979; Kuwaiti Law No. 2 of 1961, Laws No. 36, 37, & 43 of 1964, Law No. 32 of 1969 (Kuwait does permit a foreigner to hold up to 49% of the equity of its Kuwaiti representative), and Law No. 68/1980. *See* Belder & Khan, *Legal Aspects of Doing Business in Pakistan*, 20 Int'l Law. 535, 556-62 (1986); Qatar Law No. 3/1985; Saudi Arabian Royal Decree M/11 of 1962, *as amended by* Royal Decree M/8 of 1973; Syrian Decree No. 151/1952, art. 21, Clarification of Decree No. 51 Concerning Middlemen and Brokers, Office of Prime Minister Notification No. 14/B 271/15, issued Feb. 7, 1980; U.A.E. Federal Law No. 18/1981, arts. 3, 9, & 10, and Ministerial Decree No. 22/1981; Yemen Arab Republic Laws No. 17/1972 & No. 6/1976. *See generally* Taylor & Weissman, *supra* note 3.

42. 15 U.S.C. § 78 (1986).

43. Saudi Arabian Royal Decree M/2 of Jan. 20, 1978. *See also* U.A.E., *supra* note 41; Oman, on the other hand requires a local sponsor, who must be engaged before the exporter

tries mentioned above, the use of a local representative is virtually mandatory as a practical matter.

After checking whether the proposed representative needs to be a local national, and then checking that the selected representative meets this requirement, it is important to determine whether the foreign representative needs to register with or notify the government of the representation. In the Middle East such cumulative registration requirements are quite common.[44] Similar requirements exist in some South American countries.[45] Often, both the representative and the representation agreement must be separately registered and approved.[46] The approval often extends to a substantive examination of the representative's remuneration.[47] The United States exporter next needs to be concerned whether government contracts will be entered into. If so, special requirements may have to be observed under foreign law. Israel, for example, has long required that special permission be obtained before a commission be granted for the sale of military wares to the Ministry of Defense. The Ministry then developed the practice of publicly regulating the allowable commission rate.[48] Saudi Arabia prohibits the use of agents on certain armaments contracts and on government-to-government contracts.[49] Also, the United States exporter needs to be concerned about the impact of United States

even arrives in Oman. Royal Decree No. 3/1974, *as amended by* Royal Decrees No. 2/1977 and 16/1978 and The Law of Commercial Agencies, Royal Decree No. 26/1977.

44. *See, e.g.*, Bahrain, *supra* note 41; Egyptian Law, *supra* note 41; Promulgating Law for Organizing Operations of Commercial Agency and Certain Mediation Activities with the Executive, Reg. & Order No. 342/1982 (Egypt); Jordanian Law, *supra* note 41; Kuwaiti Law No. 36/1964, art. 3; Syrian Law No. 151/1952, art. 19; Iraqi Law, *supra* note 41; Saudi Arabian Law, *supra* notes 41 & 43; U.A.E., *supra* note 41. *See also* Argentinian Law No. 20.575 of Jan. 2, 1974 (derogated by Law No. 21.382/1976); South Korean Antimonopoly and Fair Trade Law, art. 24 (1981); South Korean Implementing Decree art. 28 & Economic Planning Board Notice No. 49; French Decree No. 58-1345 of Dec. 23, 1958, art. 4 (requiring commercial agents to register with the Commercial Court); Netherlands' Handelsregisterwet (Trade Register Act), art. 1 (1)(b) (requiring agents having authority to bind the principal to register); Swiss OR, Co, Co, arts. 418a & 418c.

45. *See, e.g.*, Bolivian Commercial Code, Law of Mar. 29, 1977, art. 1250. *See generally id.* arts. 1248-1259; Colombian Commercial Code, Decree No. 410, art. 1320 (Mar. 27, 1971).

46. *See, e.g.*, Argentinian Law, *supra*, note 44; Abu Dhabi Circular No. 3/78 of Feb. 8, 1976; Bahrain, *supra* note 41; Saudi Arabian Royal Decree, *supra* note 41, arts. 10 & 11 and Implementing Regulations (the agreement must cover the capacity and nationality of the exporter and the representative, the territory, the scope of the representation, its term and renewal, and termination procedures); Saudi Arabian Ministry of Commerce, Model Agency Contract, 1981 (available from Office of the Near East, International Trade Administration, Department of Commerce); Syrian Decree, *supra* note 41.

47. *Id.*

48. *See* Israeli Law 5737-1976 of Dec. 20, 1976 (superseded in 1985-1986 according to Israeli Embassy sources).

49. *See, e.g.*, Homsy, *Legal Aspects of Doing Business in Saudi Arabia*, 16 INT'L LAW. 51, 59 (1982).

legislation such as the Foreign Corrupt Practices Act,[50] the Export Administration Act,[51] and Treasury Department Anti-Boycott Regulations.[52] Finally, if EximBank financing is obtained, proper EximBank disclosures will need to be made.[53]

11. The Incorporation of the Foreign Representative

Clearly, the appointment of a foreign representative is seldom a straightforward business decision. The United States exporter should be concerned whether its foreign business partner is incorporated. If it is incorporated, then labor law protections most likely will not apply.[54] Since the United States exporter usually does not wish to establish a legal and taxable presence in a foreign country, appropriate steps should be taken to prevent the exporter from being subject to foreign labor laws. Consequently, the appointment should not specify matters that indicate employment.[55] Regardless of whether the agent is incorporated, prudence suggests that to prevent the implication that the agent is an employee, the contract should give the agent wide freedom to organize and operate the day-to-day affairs of the agency as its management pleases in return for commission without salary or reimbursement for expenses. Two good examples of matters that should not be specified in the contract are the hours of the foreign representative's trading and its place of business. The following discussion assumes that the foreign representative is incorporated rather than an individual.

---

50. 15 U.S.C. § 78 (1986).

51. 50 U.S.C. App. §§ 2401-2420 and implementing Department of Commerce Regulations at 15 C.F.R. §§ 369.1-.8 (1986). *See also* International Economic Emergency Powers Act, 50 U.S.C. §§ 1701-1706 (1986).

52. I.R.C. § 908, 927, 952(a) 995(b)(1)(F), 999; 51 Fed. Reg. 25,286 (regulations listing countries requiring cooperation with an international boycott); 49 Fed. Reg. 26,208; 49 Fed. Reg. 18,061; 49 Fed. Reg. 1075; 49 Fed. Reg. 53,003; 47 Fed. Reg. 56,490. *See also* I.R.S. Form 5713; Department of Commerce International Trade Administration Regulations, 48 Fed. Reg. 26,854 & 47 Fed. Reg. 14,205.

53. Export-Import Bank of the U.S. Regulations appear at 12 C.F.R. §§ 400.735-1 to -76 (1986).

54. *See, e.g.*, Argentinian Law No. 11.544/1929, *as amended by* Decree-Law No. 10.375/1956 and Law No. 16.15; Argentinian Law No. 14.546/1958 (extending labor law benefits to business agents); French Code Du Travail [C. Trav.]; Judgment of Jan. 13, 1972, Cass. civ. soc., Fr., Bull. Civ. VI; Judgment of June 23, 1966, Cass. ch. reun. Fr., 1966 Bull. Civ. III, at 2; Judgment of Mar. 1, 1973, Cass. civ. soc., Fr., 1973, Juris-Classeur Periodique [J.C.P.], Etudes et Commentaries, No. 11754, at 281.

55. *See, e.g.*, Argentinian Laws, *supra* note 54; French C. Trav. art. 291 (agency contracts for France should explicitly exclude the relationships of employment and Voyageur Representant et Placier); Mexican Federal Labor Law, 1970 Dianio Oficial [D.O.] art. 285; but see *id.* art. 15, making the exporter jointly and severally liable to the representative's employees for labor law obligations.

12. TERM OF THE APPOINTMENT

In every foreign distributorship the term of appointment will constitute an important point of negotiation. Exporters will inevitably prefer to limit a term of appointment, whereas the foreign representative will seek security of tenure. In counseling the American exporter, it is important to point out that the longer the term agreed to, either as a single term or by virtue of an evergreen clause, the more difficult and costly it will be to terminate the arrangement even once that term comes to an end. Optimally, the term should be a fixed and definite term of no longer than two years. Where, however, the foreign representative needs to invest capital in a product that it will be marketing, a fixed two-year term will not encourage the necessary investment. A foreign representative with no security of tenure is unlikely to have the necessary motivation to promote sales vigorously. The exporter's market penetration may then be insufficient to satisfy the exporter. Consequently, a more reasonable compromise is to establish a provisional or trial period for a nominal two-year period.

This trial contract should express an intention that its terms may form the basis for further negotiation at the end of the trial period, and that if both parties are pleased with the trial period they shall indicate their satisfaction to the other party, commence negotiations well in advance of the two-year trial term, and undertake to negotiate in good faith towards a more permanent arrangement. The trial contract should *not* state that its terms *will* form the basis of a further agreement. Evergreen problems would result. The recommended procedure presents a number of advantages. First, the exporter takes a minimal business risk, but is nevertheless able to give the representative reasonable assurance of an ongoing relationship. The exporter as well as the representative should feel comfortable with inserting performance criteria against which the trial period might be measured. Secondly, if the trial is unsuccessful from the exporter's perspective, the exporter may, and indeed should, advise the foreign representative of its dissatisfaction before the end of the trial period. Because it is a trial period, any damages or indemnity due to the foreign representative for the termination will be minimized. Of great importance in establishing a trial contract is the requirement that both renewal and termination (as alternatives) require an affirmative act of notifying the other party so that there can be no doubt as to whether the trial was or was not successful.

Furthermore, foreign representation arrangements can provide for different stages, not unlike stages often inserted in joint venture agreements, with a right of termination (subject to proper notice) at the end of each stage. In this way the expectations of the contracting parties are clearly

delineated, the development of the foreign representative is clearly charted, and the representative's performance can be scaled in a reasonable fashion to the responsiveness of the marketplace. The representation agreement should also permit the alteration of specific criteria of the various stages should uncontrollable, outside circumstances intervene to prevent the representative from meeting the parties' initial expectations for any particular market. Certainly, if the market response to the products in question does not correspond to the parties' expectations due to no discernible fault of the representative, good faith would dictate appropriate adjustments in measuring the representative's performance in each stage of development. The contract should explicitly allow for such adjustments, and establish procedures for any necessary negotiations. If, on the other hand, the criteria are to be absolute, clear, and concise, language should be included in the contract to make this perfectly unambiguous.

Use of evergreen or automatic renewal clauses without specifying a condition subsequent (such as notice to renew, achievement of performance criteria, etc.) that must occur before renewal should be avoided because a great many foreign jurisdictions will interpret automatic renewal as an intention to create a contract of indefinite duration.[56] Such contracts lead to high termination indemnity problems.

Even under United States law, evergreen contracts are unpredictable and not favored by courts. Courts will most likely hold contracts that fail to provide for a definitive term and are silent as to termination to be terminable at will,[57] subject, of course, to good faith and what, under the particular prevailing circumstances, might be deemed to be reasonable notice of termination.[58] Other courts have adopted a variation of the termination-at-will doctrine by holding that distributorship agreements of indefinite duration are cancellable after a reasonable period of time.[59] Not surprisingly, the "reasonableness" of the duration has a direct relationship to the time period required for the distributor to recoup any capital investment and, possibly, to make a reasonable profit on such investment. The moral of the story, of course, is that the duration of the proposed commercial relationship is of the utmost importance, and must be clearly provided for in the contract.

56. As outlined in text *infra* section 20.

57. Annotation, *Termination by Principal of Distributorship Contract Containing No Express Provision for Termination*, 19 A.L.R.3d 196 (1981).

58. Zidell Explorations Inc. v. Conval Int'l, Ltd., 719 F.2d 1465 (9th Cir. 1983).

59. Des Moines Blue Ribbon Distrib. v. Drewrys Ltd., 256 Iowa 899, 129 N.W.2d 731 (1964).

13. Scope of the Appointment[60]

Very often representatives will not be granted rights over the whole of the exporter's range of products, or the contract is made with only one division of an exporter. Particularly in the case of representatives who are not familiar with a large exporter's corporate organization, it is helpful to spell out these limitations. The agreement should clearly specify the product(s) involved and whether the product list may be subject to alteration upon the happening of certain events, such as, for example, the representative's failure or success to meet performance criteria. In the event the exporter desires to make direct shipments into the territory generally, or only to specific accounts, such reservations must be clearly set forth. Where an exclusive agency is granted, commissions generally will be payable to the agent in certain jurisdictions (such as West Germany) on direct sales into the territory by the exporter.[61]

As a matter of protecting its good name, an exporter may insist on a right to reserve from a representative products that, it later turns out, the representative is unable to service. The more powerful a bargaining position the exporter has, the more likely it is that the exporter will be able to insist that it may reserve a product from the representative in the future as a matter of unfettered discretion, subject to an obligation to exercise good faith.

A representation agreement should also be explicit as to whose responsibility it is to arrange all the necessary governmental approvals for the delivery of the product. Quite often the foreign representative is obligated to obtain all requisite foreign approvals or, at least, to assist and cooperate with the exporter in obtaining the same. A clause should be added obligating the foreign representative to keep the exporter advised of any changes in such laws. Furthermore, United States export controls and foreign import controls on products, services, technology, and possibly post-sale servicing equipment may restrict the transnational movement of tangibles or intangibles and impact the exporter's expectations. The agreement should permit the exporter to postpone or terminate any shipments of products and equipment or the delivery of any technology, if the exporter may be required to do so as a result of applicable law.

As the products need to be carefully identified, so should the agreement concisely provide a geographical territory or sometimes even industry restrictions, although the latter are more difficult to enforce in distribution

60. We do not here discuss terms controlling the sale of goods relevant to sales by the exporter to the distributor or to the agent's customers. Price, credit, transfer of title, risk of loss, warranties, and other terms are nonetheless deserving of precise and clear drafting.

61. *See, e.g.*, Vorbrugg & Mahler, *supra* note 3, at 610.

agreements. Clarity in these restrictions will permit the representative and the exporter to devise territory or customer-specific marketing and promotional strategies. Similar to identifying a product range with potential additions and deletions, the agreement might, if desirable, provide for potential expansion or contraction of specific territories or industries.

14. Protecting the Exporter's Goodwill

The exporter will have an interest in preserving its reputation for manufacturing high quality goods, for filling customers' orders quickly, and for servicing the product in a prompt and satisfactory manner. While these considerations should have been evaluated at the time of selecting the right representative, the exporter should insure that the distributor maintains this level of integrity by including clauses requiring the distributor to: (1) maintain an adequate inventory to fill anticipated orders promptly; (2) establish procedures for servicing the product, including the hiring and training of competent personnel and the purchase of necessary tools, machinery and equipment;[62] and (3) provide the exporter access to the distributor's premises for purposes of inspection, coupled with an obligation on the distributor to promptly remedy any deficiencies.

One of the key elements that permits the exporter to avoid unpleasant surprises is the periodic reporting obligation that is imposed on the foreign representative. This obligation is crucial to a successful ongoing relationship, and should always be combined with an obligation on the parties to meet and consult with one another. The reporting obligation, and the exporter's response in the event a report indicates unsatisfactory performance, is often the key consideration in litigation with a terminated representative. While we will discuss this issue in greater detail later on, suffice it to say here that the exporter should communicate to the representative, and document in such communication, any dissatisfaction with the representative's performance. The periodic reports should relate to such matters as the representative's financial strength, the volume of sales in a particular market or sub-market, the representative's efforts to promote the products and develop the market, resale prices (in case of a distributor), activities of competitors (including competitors' pricing), intellectual property infringements, post-sale servicing of products, inventory levels, customer complaints, change in local laws affecting the

62. Saudi Arabia, for example, imposes upon Saudi agents and distributors an obligation to provide adequate local maintenance, service, and spare parts. Saudi Arabian Royal Decree M/32, 1980, art. 23. This provision is designed to protect the interests of Saudi consumers of imports. The Saudi Ministry of Commerce has also produced a Model Representation Contract, article 9 of which requires the exporter to provide optimal support to the Saudi representative for local maintenance, service, and spare parts.

products, their importation, distribution or insurance, and product liability matters.

The manner in which the product is advertised is also an important business concern for both the exporter and the distributor. Clauses should specify, to the extent possible, the distributor's and exporter's respective duties for (1) the provision of literature and other promotional material, and the need for translation as appropriate; and (2) the cost of such advertising. Again, these clauses must be carefully worded to avoid disturbing the distributor's independence.

Preventing the foreign distributor from granting warranties in excess of what the exporter, through his own experience, knows to be commercially reasonable is also a key provision to maintaining a product's good reputation. This holds true for agents as well as distributors. The exporter would be well advised to insist on an indemnification clause in the contract to protect the exporter against third party liability if the representative exceeds the warranty terms authorized by the exporter. One provision often forgotten in warranty clauses is the use or tolerance restriction. If a product is utilized for purposes other than its specified use or beyond its specified tolerances, the contract should expressly exclude and deny any express or implied warranties.

III. Terminating Foreign Representatives

15. Structuring the Relationship to Facilitate Termination

While the distinction between agency and distributorship is generally important in Europe,[63] it is seldom important in Latin America or the Middle East.[64] In Western Europe, failure to delineate effectively between agency and distributorship can have significant legal consequences. A growing trend exists to judicially extend agency protections to distributors and vice-versa. To some extent this trend has evolved because courts are

63. *E.g.*, Handelsgesetzbuch [HGB] arts. 84-92(c) and Buergerliches Gesetzbuch [BGB] arts. 164-181, 611-630, 662-676 (W. Ger.); Code Civil (C. Civ.) arts. 1984-2010 & Decree No. 58-1345 of Dec. 23, 1958 (Fr.); *see also* Law No. 85-1708 of Dec. 30, 1985 (Fr.); Codice Civile [C.c.] arts. 1742-1753, Law No. 204/May 3, 1985 & Ministerial Decree 21-08-1985 (Italy), Presidential Decree No. 145-1961 (enforcing national contract of June 20, 1956, for agents appointed by manufacturers), Presidential Decree No. 1842 of Dec. 26, 1960 (enforcing national contract of Oct. 13, 1958, for agents appointed by sales organizations), and national contracts of Dec. 19, 1979, and June 24, 1981, for agents appointed by industrial and commercial companies; Wetboek van Koophandel [WvK] art. 75a-75s (Neth.); Royal Decree 1438 of Aug. 1, 1985 (Spain); Decree No. 178/86 of July 3, 1986 (Port.). The European Economic Council has proposed draft harmonization legislation for the Community. The British, in particular, have strongly criticized both the draft and attempted redrafts.

64. *E.g.*, Brazilian Federal Law No. 4886 of Dec. 10, 1965, art. 27(5); Saudi Arabian Royal Decree M/32/1980, art. 1; Belder & Khan, *supra* note 41, at 561-62; Swacker, *supra* note 3, at 95.

required to reevaluate whether an agent or a distributor is one in fact, or has only been called thus to circumvent local laws. Since foreign representation agreements form the basis for an ongoing business relationship, they should be able to accommodate such trends in the law. Consequently, the prudent lawyer will not rely overly on flexible statutory distinctions between agents and distributors. Exporters should be advised that although contractual protections for distributors can be weaker than those given to agents, the gap is narrowing.

16. Agency versus Distributorship: Still a Distinction with a Difference

Having regard to the functional distinctions between agents and distributors, the exporter may exercise its business judgment to prefer an agency arrangement over a distributorship. The exporter may want to control the selling process either permanently or for an initial period. The contract may indicate that the agency relationship will only apply for a trial period during which the principal will gradually hand over control in respect of operational matters. If the trial is satisfactory, a distributorship arrangement may be entered into. In using an agency as a trial mechanism, the agency term must be kept short so as to avoid the implication of permanent establishment in the foreign country.

If an agent is appointed, the agent should be incorporated to avoid the application of local labor laws.[65] If an agent were classified as an employed salesperson, not only might there be labor law consequences, but the United States exporter may be deemed to have established itself in the foreign country and be subject to taxation there. This problem is not eliminated by the appointment of an incorporated agent, but the agency contract should indicate an intention not to establish permanently in the foreign country.

Also, the agent should be required to take full responsibility for the payment of employees and for meeting any claims of those employees. The agent should be required to indemnify the United States exporter for any liability the United States exporter might incur under local laws for employee claims. As shall be discussed below, many countries permit a terminated agent or, in Belgium, a terminated distributor, to pass through to the exporter, the agent's or the distributor's costs of terminating its own employees. This pass-through should be expressed excluded, and an indemnity inserted as a backup to the exclusion of the pass-through.[66]

65. *See* text *supra* section 11.

66. Belgium, for example, gives especially high termination indemnities to terminated salespersons. The indemnity can amount to two or three years' income. Belgian Law of July 30, 1963, *as amended by* Law of Nov. 21, 1969; Jones, *supra* note 3, at 118.

Notwithstanding that an agent is not ultimately responsible for supplying customers, it often makes good sense for the agent to be given some responsibility, much as a distributor would, for getting the goods from the ship or aircraft to the customer. The agent should be required to assist with the clearance of goods through customs and assure successful internal carriage of the goods.

17. An Overview of Foreign Protective Legislation

We next proceed to a review of the major issues that arise in connection with foreign protective laws, including a discussion of various national provisions.[67] We also look at some common approaches to appointment

67. Many countries provide representative protection legislation. The following laws include those that place substantial burdens on the exporter wishing to terminate its foreign representative. Austrian Mercantile Agents Law of 1921, *as amended* June 15, 1978 (protects agents only) and *see* Foreign Trade Act amendment of 1984; Bahrain, *supra* note 41; Belgian Law, *supra* note 24 (protects distributors only); Brazilian Fed. Law, *supra* note 64, arts. 27-39 (protects agents only); Colombian Commercial Code, arts. 1317-1331; Costa Rican Law, *supra* note 25; Dom. Rep. Law No. 173 of Apr. 6, 1966, *amended by* Law No. 263 of Dec. 31, 1971, Law No. 622 of Dec. 28, 1973; Dom. Rep. Law No. 664 of 1977; Ecuadoran Supreme Decree 1038-A, Official Register No. 245, Dec. 31, 1976; El Salvador Commercial Code, arts. 392-399b, *as amended by* Decree No. 247 of Jan. 3, 1973; Finnish Law No. 389 of May 30, 1975 (protects agents only); French C. Civ., *supra* note 63 (protects agents only); Guatemalan Decree No. 78-71, Official Gazette of Oct. 1, 1971, *supplemented by* nonabrogated provisions of Decree No. 270 of May, 1970, and the Civil and Commercial Codes; Honduran Decree No. 50 of Oct. 8, 1970, *amended by* Decree No. 549, Nov. 24, 1977, and Decree No. 804, Sept. 10, 1979; Italian C.c., *supra* note 63 (protects agents only); Indonesian Decree No. 295/M/SK/7/1982 & Decree No. 446/M/SK/7/1982 (regarding sole agency of electronic equipment and household electrical appliances) and Decree No. 397/M/SK/7/1982 (regarding subagency of automotive products and heavy equipment), *cf.* Reg. No. 77/Kp/III/78 (minimum duration is three years), and Decree No. 502/UPTS/1985 (restricts representation in the construction industry); Jordanian Law, *supra* note 41; Kuwaiti Commercial Law, effective Feb. 25, 1981, arts. 281-282; Moroccan Dahir of May 21, 1943; Netherlands WvK, *supra* note 63 (protects agents only); Nicaraguan Decree No. 13 of Jan. 5, 1980 (reenacting and modifying Decree No. 287 of Feb. 2, 1972) (further modified by Sandinist authorities); Norwegian Law of June 30, 1916, *amended by* Law of June 1, 1973; Omani Royal Decree, *supra* note 43, and Royal Decree No. 26/77 arts. 7 & 8, Omani Official Gazette of Jan. 6, 1977; Panamanian Executive Decree No. 344 of Oct. 31, 1969, and Decrees No. 9 of Feb. 7, 1970, and No. 48 of Apr. 6, 1971; Philippines, e.g., Presidential Decree No. 1789 (Omnibus Investments Code applies only if the foreign exporter is "doing business" in the Philippines), and Corporation Law (Act. No. 1456 *as amended*), Foreign Business Regulations Act (R.A. 5455), Investment Incentives Act (R.A. 5186, *as amended*) and the National Internal Revenue Code; Portuguese Decree, *supra* note 63; Puerto Rican Civ. & Comm. Code, *supra* note 25; Saudi Arabian Royal Decree M/11 of 1962, *as amended by* Royal Decrees M/5 of 1969, M/8 of 1973, and M/32 of 1980; Ministerial Decision No. 1897, Official Gazette No. 2865 (Apr. 17, 1981) (termination compensation is actually indicated only by administrative practice); Spanish Royal Decree, *supra* note 63 (applies only to individuals, not to legal entities acting as agent); Swedish Act of April 18, 1914, *amended by* Law 219 of May 1974 (protects agents only); Swiss Law of Agency Agreements of Feb. 4, 1949 (protects agents only); U.A.E. Federal Act. No. 18 of Aug. 11, 1981 (effective Feb. 24, 1982), art. 9, and Ministerial Decree No. 22 of 1981; Venezuelan Labor Law of Nov. 3, 1947 (entitles "unfairly" discharged agents to employee benefits); W. Ger. HGB & BGB, *supra* note 63 (protects agents only).

and termination in international representation agreements drafted by American lawyers. We state at the outset of this portion of the discussion that attempts to draft around the various protective laws have generally failed. Even when clauses purporting to limit or avoid statutory protections do not form the subject of litigation, they often create an acrimonious business climate. Both the exporter's and the foreign representative's profits suffer.

Two authors have recently identified thirty-two countries that restrict the termination of a foreign representative.[68] Such legislation is often a reaction to essentially unfair and unconscionable contract terms. For many years American exporters were perceived as overly tough negotiators insisting on harsh terms for the distribution of their products. Often a foreign representative would develop clientele and goodwill, and the exporter, recognizing the now established and profitable salability of its product in the representative's country, terminated the representative in order to garner those profits itself.[69]

Two key elements typify the legislation enacted in many countries as a response to these concerns: minimum notice requirements and compensation requirements. Usually, the representative is entitled to generous notice of termination and both compensatory and precatory damages.[70]

Compensatory damages usually compensate for a lack of reasonable notice of termination. These damages will be awarded in the absence of just cause for the termination, and include a measure of the net profits that the distributor would have obtained during the notice period foregone (inventory the distributor could have sold), the fixed costs to the distributor of the distributorship, and an estimate of goodwill (usually proportionate to the trend in the distributor's gross sales).

In the jurisdictions most protective of the representative, assessment of precatory damages can be expected in most cases of termination. The indemnity payable for precatory damages is designed to compensate for loss of the representative's subjective expectations of an ongoing relationship. Only if these expectations are unreasonable will a court in such protective jurisdictions not award this indemnity. Precatory damages usu-

68. Saltoun & Spudis, *supra* note 2, at 885, 914-16. In July 1986 Portugal also enacted protective legislation. *See supra* note 63. We also add Morocco to the list and have deleted Lebanon because of the collapse of the rule of law in that country.

69. Saltoun & Spudis, *supra* note 2.

70. The terminology "compensatory" and "precatory" is our own. While the notion of compensation is relatively familiar, the indemnity to which a terminated representative is often entitled includes damages for lost expectations, which vary from the concrete to the speculative. We describe them as precatory because they compensate for dashed hopes.

ally include a measure of any increase in clientele obtained by the distributor that accrues to the benefit of the exporter after termination, and those expenses incurred by the distributor in operating the distributorship that benefit the exporter after termination (for example, marketing the exporter's trademark and amounts owed by the distributor to personnel dismissed as a result of the termination), and will cover the unexpired portion of the contract term plus any likely renewals.[71]

Additionally, a terminated distributor may block direct sales by the exporter and inhibit registration of a replacement representative until the exporter has paid what the terminated representative considers to be adequate compensation. In Arab countries termination and replacement may be impossible once word of the termination spreads. The terminated representative will often avenge his wounded feelings by fouling the reputation of the exporter and its products.

Lest protective legislation deter the United States exporter, economic common sense has resulted in many exporters discounting the commissions payable to an agent or the price charged to a distributor by the present value of estimated termination settlements. In the final analysis, protective foreign legislation is no more and no less than yet another cost of doing business overseas.

The following provisions will enhance an exporter's ability to achieve freedom to terminate: (1) the notice period should be generous, and the method of giving notice should be set forth clearly and followed in its application; (2) a provision identifying an initial limited term as a trial period during or at the end of which either party may refuse (by proper notice) to renew the contract if agreed expectations are not achieved or if either party should determine the results to be unsatisfactory; (3) reasonable terms limiting compensation upon termination, or, for the more optimistic draftsman, waiving them; (4) the "just cause" for termination clause should give an illustrative, nonexhaustive list of events that will justify termination; and (5) sensible choice of law, choice of forum, and submission to personal jurisdiction clauses. The exporter may also want to include a provision whereby it will have the option to terminate the arrangements during a reasonable time if certain individuals in the representative's organization change or if there is a substantial change in ownership, explicitly defining these events to be agreed "just causes" for termination.

71. Sunt, *supra* note 3, at 22; Swacker, *supra* note 3, at 99-100. *See generally* Puelinckx & Tielemans, *supra* note 2.

18. Notice Requirements

Some countries' laws grant the representative either a right to generous notice of termination or a fulsome indemnity upon termination.[72] Many grant both.[73] Rights to notice as well as rights to indemnity usually depend upon whether the termination is for the convenience of the exporter or due to some breach of the representative agreement by the agent or distributor. The consequences of the two types of termination can be quite different, and so in the following discussion we distinguish between termination for convenience and termination for just cause. Where notice and compensation are alternatives, notice is required mostly for terminations of convenience rather than terminations for just cause.

Given the strict protections accorded by protective statutes, termination clauses should track the statutory termination rules. Counsel should note that while proper notice avoids the need to pay compensation for termination by way of indemnity, precatory as opposed to compensatory damages cannot always be avoided, though a reasonable liquidated damages or buy-out provision will usually be enforced.[74] For example, a Belgian distributorship agreement should require that notice be given not less than three months nor more than six months prior to the end of the contract term, and that a party wishing to terminate must notify the other by registered letter, or else the contract is deemed to be renewed.[75] The parties can deviate from this standard by mutual accord at the time notice of termination is given, but not in the contract itself or by amendment to the contract.[76] The statutory objective is to permit the terminated party to obtain a new business of reasonable equivalent economic value. Moreover, during the notice period, neither the exporter nor a replacement distributor may compete with the terminated distributor.

The Belgian Cour de Cassation has on at least one occasion upheld a contractual waiver of the rights to indemnity and to notice.[77] The Belgian

72. *See, e.g.*, Swedish Act, *supra* note 67; *cf.* The Indian Contract Act, 1872, §§ 203-206 (notice is mandatory in all terminations).

73. *See, e.g.*, Port. Decree, *supra* note 63, art. 30 (one month notice required for terminations for cause); Cowles, *Indemnities for Terminating Foreign Representatives*, 53 B.U.L. Rev. 278, 287 (1973); Jones, *supra* note 3, at 113-14, 117, 119, 123, 124; Juncadella, *supra* note 3, at 36-37, 40, 41, 43, 47, 49.

74. Sunt, *supra* note 3, at 22. Termination for just cause is conditioned on a "serious failure" to comply with the distributorship agreement, *e.g.*, failure to sell a single item, zero promotional activity, or zero payments for goods delivered. *Id.*

75. Law of July 27 on the Unilateral Termination of Exclusive Distributorship Agreement of Infinite Duration, Moniteur, Belge, *supra* note 24, art. 3.

76. *Id.* art. 2.

77. Judgment of Apr. 19, 1973, Cour de Cassation (Belgium), 1980 J.C.B. 440-455, cited in Simons, *supra* note 3, at 759.

courts, however, have no difficulty in perceiving abuse of the waiver and awarding damages in the form of an indemnity for such abuse. Finally, a Belgian distributorship should state that two such renewals, between the same parties, regardless of any modification or renegotiation of the contract, will not constitute a contract of indefinite duration. Judicially implied notice periods for contracts of indefinite duration can be up to three years.

Similarly, where the governing statutes in other countries permit termination for convenience, the contractual provisions should closely track the statute. Should such a termination clause be subjected to judicial scrutiny, and otherwise comply with applicable law, the clause is likely to be enforced in accordance with its terms, thus avoiding unpleasant surprises for the United States exporter. For example, in West Germany an agency contract may establish its own required notice periods for a termination of the agency.[78] If no notice period is expressed, the Handelsgesetzbuch implies one. In the first three years of an agency, six weeks' notice given at the end of a quarter year will suffice. Thereafter, six months notice must be given, again at the end of a quarter year. Moreover, a contractual notice period of less than one month will receive strict judicial scrutiny for reasonableness of such "urgent" termination.[79]

19. Defining "Just Cause"

Civil law countries have varying lists of acceptable reasons for terminating a foreign representation.[80] The primary substantive issue is just how serious a breach of contract is required before an agency or distributorship may be terminated. Most jurisdictions permit the parties to agree as to what constitutes "just cause" for termination. If the contents of the list are reasonable, the list will likely be judicially respected.[81]

In West Germany agency terminations have not been judicially questioned where (1) the agent induces another agent working for the same

78. HGB (W. Ger.) art. 89, § 1.

79. *Accord* WvK, *supra* note 63, *reprinted in* Doing Business In Europe, Common Mkt. Rep. (CCH) ¶ 26,791. While Japan respects contractual notice periods exercised in good faith, if no notice period is provided for, art. 50 of the Commercial Code sets two months as the appropriate notice period. Thirty days is generally considered reasonable in a domestic context. *See, e.g.*, Blalock Mach. & Equip. Co. v. Iowa Mfg. Co., 576 F. Supp. 774 (N.D. Ga. 1983).

80. *See, e.g.*, Austrian Mercantile Agents Law, *supra* note 67, art. I, *as amended*, July 30, 1960; Brazilian Federal Law, *supra* note 64, arts. 34-35; Colombian Law, *supra* note 45, art. 1325; Dom. Rep. Law, *supra* note 67; Ecuadoran Supreme Decree, *supra* note 67.

81. *Cf.* Schultz v. Oman Corp., 737 F.2d 339 (3d Cir. 1984) (applying the Minnesota equitable recoupment doctrine to an agreement permitting termination for convenience upon 60 days notice).

principal to join a competitor of the principal;[82] (2) the agent is constantly and grossly negligent in the commercialization of the principal's product;[83] (3) the agent enters into unauthorized sales of competing brands;[84] or (4) the agent refuses to comply with the principal's instructions, for example, with respect to advertising.[85] Poor sales performance, however, will generally not be adequate grounds for dismissal without notice unless such performance falls within the contractually defined parameters of "just cause."[86] Of course, the advantage of agency over distributor relationships is the control that the exporter can exercise over the agent's activities. The exporter cannot exercise equivalent control over the independent distributor. The exporter can control every facet of an agent's operations, including pricing, the method of distribution, and conditions of sales. To some exporters this is important enough to warrant subjecting themselves to the agency protective laws.

An illustrative list of justifiable termination events should be contractually set forth. Furthermore, the contract should state that the list is not exhaustive, and should negate any application of the maxim *ejusdem generis*. Notwithstanding these qualifications, the list should be as exhaustive as possible.

One alternative that is growing in popularity is to require the victim of a breach to notify the party in breach, and to require that the two parties consult with each other in good faith on the most effective means to cure the breach and to achieve any necessary restitution of its consequences. A time limit should be set within which these consultations would occur, coupled with a requirement that neither litigation nor arbitration may be pursued until attempts at consultative dispute resolution have been exhausted. Often much wasted time, trouble, and expense can be avoided if the contract by its terms encourages the parties to negotiate creative solutions rather than to adopt adversarial postures.[87]

Possibly the most popular "just cause" for termination in representative arrangements is failure to meet a stepped-up quota. This quota usually increases over the life of the representation. The preamble to the quota provision might recite that the quota is being stepped-up in proportion to anticipated growth in goodwill for the exporter's product and trademark.

82. Judgment of Mar. 11, 1977, 1977 DER BETRIEBS-BERATER 1170; *see also* 1979 DER BETRIEBS-BERATER 242, and 1983 DER BETRIEBS-BERATER 1629.

83. Judgment of Feb. 28, 1963, 1963 DER BETRIEBS-BERATER 447.

84. Judgment of Feb. 23, 1972, 1972 DER BETRIEBS-BERATER 467.

85. Judgment of June 9, 1960, 1960 DER BETRIEBS-BERATER 956.

86. Judgment of Dec. 2, 1970, 1971 DER BETRIEBS-BERATER 572; *accord*, Judgment of Feb. 28, 1963, 1963 DER BETRIEBS-BERATER 447; Puelinckx & Tielemans, *supra* note 2, at 460.

87. *See* text *infra* section 24. This alternative includes the possibility of an "abridged mini-trial."

Either party should be permitted to approach the other for reasonable adjustments to the quota should special circumstances arise. The foreign representative should acknowledge that low sales hurt the exporter's goodwill in the territory, and that if the representative is terminated because of failure to meet the quota, the representative will not be entitled to compensation, since the damage to the exporter's goodwill is likely to be at least as great as the losses the representative might incur as result of the termination.

20. Terminating Contracts of Indefinite Duration

A contract that has been renewed a number of times or contains an automatic renewal or evergreen clause is often more difficult to terminate. In Belgium, for example, two renewals of a distributorship agreement will constitute a contract for an indefinite duration even if its terms have been modified substantially.[88] Ecuador goes further: only the representative has the right to terminate, and may insist on continuous renewals of a fixed term.[89] In Portugal it seems that only contracts for indefinite duration may be terminated for convenience.[90] The French courts are divided on whether automatic renewals transform a contract into one of indefinite duration.[91] Sweden, however, permits termination of a contract of indefinite duration without notice if the termination is for just cause.[92] In West Germany the agency contract is deemed prolonged for an indefinite duration if, upon expiration of the initial term, the agent, with the knowledge of the principal, continues with the performance of its obligations under the agreement.[93]

To protect the exporter from termination damages, renewal terms should specify particular acts that must be done to renew the agreement, as well as a limited renewal term. If these are not included, courts may construe the agreement as one of unlimited duration, and hold the exporter liable for termination damages.

21. Measures of Indemnity for Termination

Protective legislation will provide a terminated representative with a right to an indemnity as compensation for the termination. We have selected three European countries (West Germany, France, and Belgium),

88. Simons, *supra* note 3, at 756. This rule also operates in Brazil.
89. Ecuadoran Supreme Decree, *supra* note 67.
90. Portuguese Decree, *supra* note 63, art. 28.
91. Sales, *supra* note 3, at 747.
92. Saltoun & Spudis, *supra* note 2, at 888 n.14.
93. BGB § 625, *supra* note 63.

and two South American countries (Brazil and Panama) as examples in discussing the measures of compensation for terminated representatives.

A West German agent is entitled to compensation for loss of goodwill if: (1) the principal derived considerable benefits from the contracts that the agent had established with new clients; (2) the agent has lost or will lose commission due to the termination of the agency; and (3) the payment of compensation is just and fair. Maximum compensation generally equals one year's gross commissions based on an average over the last five years or period of the agency, whichever is shorter. No compensation need be paid if the dismissal is reasonable and contractually permissible or if age or illness is the reason for dismissal.[94]

These protections for German agents are one variation on a theme that runs throughout Western Europe, Belgium excepted—the protections do not purport to cover distributors, although the Bundesgerichtshof in West Germany will grant a distributor compensation, including for lost goodwill, if the distributorship goes beyond a straightforward buyer-seller relationship and evidences some of the hallmarks of an agency.[95]

In France the usual measure of damages is the average of the last two years' commissions. A terminated agent's compensation will vary in accordance with the goodwill the agent has created for the product, the amount of past commissions earned, the agent's investment in the agency, the agent's specialized qualifications, the percentage of the agent's overall business devoted to the product, the consequential cost of termination to the agent such as staff layoffs, and any abuse of right that caused unnecessary hardship to the agent.[96] Some confusion exists as to whether a French agent can waive its right to an indemnity by contract.[97] Just cause is, however, a fault-based measure, and if the agent is truly at fault, the indemnity may not be available.

The measure of fault is significantly skewed in favor of the agent. Reduced sales must be "ridiculously low" to constitute just cause.[98] Also, failure to meet reasonable sales goals will not constitute just cause where the French agent makes reasonable efforts to sell, but the product still loses its customer appeal.[99]

---

94. Puelinckx & Tielemans, *supra* note 2, at 461.

95. Judgment of Feb. 11, 1977, 1977 Neue Juristische Wochenschrift [NJW] 896.

96. Sales, *supra* note 3, at 744.

97. *See, e.g.*, Judgment of June 28, 1958, Cour d'appel, Paris, 1958, 2 GAZETTE DU PALAIS, JURISPRUDENCE 253, *aff'd by* Cour de Cassation Judgment of July 5, 1962, Cass. civ. com., 1962, 2 GAZETTE DU PALAIS, JURISPRUDENCE 161 (upholding freedom to waive) (followed through 1979). *But see* Judgment of Dec. 13, 1973, Cour d'appel, d'Amieno, 1975 D.S. Jur. 45 (holding that "a mandate of common interest" prevented unilateral termination).

98. Sales, *supra* note 3, at 743.

99. Encyclopedie Dalloz, Commercial V°, Agent Commercial NR 134; Cas. Com. Feb. 9, 1982 (Unrep; *see* Lamy Commercial 1983 NR 2147), *cited by* Sales, *supra* note 3, at 744.

The statutory protections provided to distributors in Belgium depend on an agreement being exclusive (or even quasi-exclusive, i.e., the distributor sells in the territory practically all of the products to which the distributorship applies) or having an indefinite duration.[100] Belgian courts will strain constructions to find a contract exclusive or quasi-exclusive or of indefinite duration. The Belgian distributor is entitled to an indemnity if he is terminated without just cause or without proper notice.[101] Both compensatory and precatory damages are awarded.[102] This rule is often applied by analogy to agents as well as distributors.[103] For an agent to claim the indemnity, the agent must have been terminated in an abusive and untimely manner.

In South America both terminated agents and terminated distributors receive an indemnity when they are terminated for convenience. Agents, however, may expect less compensation than distributors because agents do not put up the same risk capital.[104] When a distributor is terminated for convenience, he loses that risk capital without good cause. In most other respects the indemnity payable is similar to those just outlined above for European countries.

In Brazil, if a contract is silent as to its termination, reasonable notice will be required, and for a termination for convenience upon less than one month's notice, the usual amount of compensation is one-third of the last three months' earnings.[105] The minimum statutorily permitted compensation is one-twentieth of the total "commissions" earned during the period of the representation; but if the contract does not contain an indemnity provision, or if the provision is for less than the one-twentieth fraction, a minimum indemnity is one-fifteenth of total commissions earned.

The Panamanian law covers all representatives, agencies, and distributorships, but provides an interesting stepped-up indemnity plan. If the terminated representation lasted less than five years, the indemnity will be the average gross profits of the representative over those five years. If it lasted five to ten years, then twice the average gross profits over the

100. Puelinckx & Swennen, *Belgium*, in INTERNATIONAL HANDBOOK ON COMPARATIVE BUSINESS LAW 3-4 (1979).

101. *See, e.g.*, Judgment of Oct. 6, 1983, Cour d'appel, Brussels, JOURNAL DE TRIBUNEAUX, Feb. 25, 1984, at 134.

102. Belgian Law of July 27, 1961, on the Unilateral Termination of Exclusive Distributorship Agreements of Infinite Duration, *supra* note 24, art. 3.

103. *See, e.g.*, Judgment of May 10, 1982, Tribunal de Commerce, Brussels, 1983 REVUE DE DROIT COMMERCIAL BELGE 241, 244 (fixing the indemnity by reference to the notice period that should have been given); Judgment of Sept. 3, 1981, Tribunal de Commerce, Brussels, 1982 J.C.B. 630 (six weeks' notice of termination for a five-year agreement held insufficient; three months ruled to be an appropriate notice period).

104. *See generally* Swacker, *supra* note 3; *cf.* S.A. Putzey & Melot v. Intermed Export-Import, 1982 J.T. 823 (Comm. Liege, Apr. 23, 1980) (noting a similar position in Belgium).

105. Swacker, *supra* note 3.

last five years is payable. If it lasted ten to fifteen years the indemnity is three times this measure; if it lasts fifteen to twenty years it is four times the measure; and finally, if it lasts more than twenty years it is five times this measure. In addition, the exporter must repurchase the representative's inventory at warehouse cost and pay for the holding and storage costs incurred after termination. Just cause is defined so as to include breach of those contract terms that induced the granting of the distributorship; fault or breach of trust (or fiduciary duty); incompetence or negligence; systematic reduction in sales or distribution; breach of confidentiality; and other prejudicial acts that prevent the normal continuance of the distributorship.[106] The catch is that just cause must be established before the Ministry of Commerce and Industry prior to the termination being implemented. If just cause is not established, importation will be stopped until a proper indemnity is paid. If the parties settle a matter between themselves, the settlement must have ministerial approval before importation may resume or continue.

Some waiver of compensation clauses have been struck because the waiver of compensation has not been set out sufficiently in the contract itself. This oversight can be a costly error because some countries do not permit a terminated representative to be replaced, nor may the United States exporter sell directly in the country until the terminated representative is properly compensated.[107]

22. Other Termination Consequences

Of vital importance to United States exporters is that, upon termination of the foreign representative, the representative must return all customer lists and documents containing trade secrets, as well as merchandise held. The goodwill that these documents can represent belongs to the exporter.

If an agency relationship is selected, the components of the agent's remuneration should be separately set forth in the contract. Termination indemnities are often based on gross commissions. Even if the agent must cover its own expenses out of commissions received, the contract should split the commission into profit and expense portions. The contract should expressly limit the termination indemnity to the expense portion alone.

Distributorship agreements should include clauses dealing with (1) unfilled orders upon termination; (2) settling accounts between distributors and exporters upon termination; and (3) instructions regarding the return or disposition of promotional, sales, and other literature relating to the

106. *See id.* at 38.

107. *See, e.g.*, Costa Rican Law, *supra* note 25, art. 9 (Apr. 3, 1978); Guatemalan Decree, *supra* note 67, art. 8; Honduran Decree Law No. 549, art. 15 (Nov. 24, 1977).

exporter's products in the distributor's possession at termination. These provisions should be fair and minimize cost and embarrassment for both the supplier and the distributor. Equitable provisions should be made for the handling of, and compensation for, orders placed by the distributor (1) prior to receipt of the termination notice; (2) during the notice period; and (3) for liquidation of supplies once termination becomes effective. Provisions should also include specifics regarding outstanding service contracts the distributor may have with respect to products in the hands of customers. A clause should also stipulate the distributor's duty to stop using the supplier's intellectual property upon termination.

IV. Miscellaneous Issues

23. Documentation

Civil law countries are generally more liberal than common law countries allowing reference to preliminary negotiations and other matters extrinsic to the contract. Thus, "entire agreement" clauses, while clearly desirable, should also delimit the scope of interpretation by incorporating by reference (often attached as exhibits) the form of order forms, acknowledgment forms, and INCOTERMS that are to be used.

24. Arbitration and Conciliation

A useful initial checklist of countries where arbitration is likely to be both available and effective is the list of parties to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[108] The utility of selecting arbitration as the preferred dispute settlement mechanism is a matter that should be cleared with local counsel. Often national law will permit only domestic arbitration and not arbitration overseas.[109] In selecting the forum, parties should ensure that as between the United States and the distributor's country, any judgments or arbitral awards will be

108. New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S 38 (1959). The United States implementing legislation is embodied in 9 U.S.C. §§ 201-208 (1972). The United States acceded to the Convention with two major reservations on December 29, 1970. First, the United States would apply the Convention only to awards made in the territory of another contracting state. Second, the Convention would only be applied to commercial disputes as categorized under United States law. *Id.* § 202. A number of other countries have made similar reservations. The Institute for Transnational Arbitration (ITA) of the Southwestern Legal Foundation recently published a scoreboard of countries adhering to various transnational arbitration treaties. The ITA's scoreboard is reproduced with the consent of the ITA in the Appendix to this article. The Institute for Transnational Arbitration, News and Notes (July 1987).

109. *See, e.g.*, Honduran Decree, *supra* note 67, art. 21; Dom. Rep. Law, art. 7 & 8 of Law 173/1966, *supra* note 67.

recognized and enforced.[110] The arbitration clause should specify which rules of arbitration will govern in the event of a dispute.[111] It should also contain a stipulation as to choice of forum.[112]

25. Payment Clauses

An agency agreement should specify when commissions accrue to the account of the agent and when those commissions are payable. Accrual and payment are two distinct points to be covered in the agreement. The contract should clearly state that the agent has "earned" the commission, and the commission becomes payable to the agent only when the exporter actually has received the purchaser's payment, although this is quite a harsh standard and should be reviewed under local or other applicable law. While it is possible that such a clause will receive strict judicial scrutiny, it is important to provide the agent with the necessary incentives to collect for the sales it initiated. The exporter is often in a poor position to initiate collection proceedings, and where legally permissible, collection should be an explicit undertaking of the agent. Inquiries should be made to ascertain whether regulations in the foreign representative's country hinder or prevent currency exchange in remittance of payments to the United States. Few free market countries prevent remittance entirely. Many regulate remittances by establishing varying exchange rates and levy a withholding tax on monies flowing out of the country. If the country has entered into a double taxation treaty with the United States, that treaty may well provide exemption from withholding. Ultimately though, a United States tax credit can be obtained for most foreign taxation payments.

---

110. Extensive literature exists on the recognition and enforcement of foreign arbitral awards. *See, e.g.*, Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & Pol. Int'l Bus. 1191 (1977); Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 Am. J. Comp. L. 703 (1983).

111. Two of several alternatives are the International Chamber of Commerce's Arbitration Court and Rules, *reprinted in* 15 I.L.M. 395 (1975) and the UNCITRAL Arbitration Rules, *reprinted in* 15 I.L.M. 701 (1976). *See also* UNCITRAL Model Law on International Commercial Arbitration, *reprinted in* 24 I.L.M. 1302 (1985), *strongly criticized* in Bus. L. Brief (Financial Times), May 1984, at 3-4; London Court of International Arbitration Revised Rules, *reprinted in* 24 I.L.M. 1137 (1985). *See also* Euro-Arab Chamber of Commerce, Rules of Conciliation, Arbitration and Expertise, *reprinted in* 24 I.L.M. 1119 (1985). Under art. 23-2 of the Euro-Arab rules, the parties may choose the place of arbitration, but the law applied must include "application of the mandatory provisions of the municipal laws of the place chosen."

112. Some jurisdictions do not admit finality of arbitrations. Common law countries that do not have an arbitration act (and some that do) do not permit arbitration to be final. Belgium will respect only those arbitrations that take place in Belgium and that apply Belgian law. Law of July 27, 1961, art. 6 (although Belgium has implemented into Belgian law the European Convention for Uniform Arbitration, Law of July 4, 1972).

Regardless of any restrictions or regulations affecting currency exchange or payment, the foreign representation agreement should contain a provision obligating the representative to arrange for requisite approvals from, or notification to, exchange control authorities or central banks to meet the manufacturer's objectives. Furthermore, the agreement should explicitly select (1) a currency of account (in most South American and many other developing countries, and certainly centrally controlled market countries, the currency of account must often be expressed in local currency terms); (2) a date of accounting (with rights of audit); (3) a currency of payment (and possibly an alternative currency if subsequent restrictions prevent the exchange into U.S. dollars); (4) the date of payment; (5) the location of payment (which should of course, if permissible under local laws, be the exporter's United States bank); and (6) a regular date for currency conversion that is beyond the control of either party (to avoid any temptations). In today's climate of volatile exchange rates, clients should be counseled that by removing discretionary elements from the payment clause, the predictability and consistency of their business relationship will benefit.

26. Some Tax Considerations

A United States exporter negotiating for foreign representation should structure the representation and organize conditions of sale to minimize liability to taxation both at home and in the foreign country.

Exporters are often tempted to explicitly retain title to shipped goods until they are paid. Under the title passage test that has prevailed under the U.S. tax laws for many years, the geographic location where title to the goods passed determined whether the exporter's income from the sale constituted domestic or foreign source income for purposes of determining the ceiling on the amount of foreign income taxes that could be credited against the exporter's United States income taxes. Under that test, an exporter, by transferring title outside the United States, could generate foreign source income and hence increase the ceiling on the amount of foreign income taxes available as a foreign tax credit. The title passage test has generally survived in the 1986 tax legislation for sales of inventory by United States persons.

If title is to pass abroad, the import duties, value-added-taxes and other ad valorem imposts of the foreign country will affect the decision whether to transfer title before or after customs clearance. The taxable value of the goods should be minimized at the point of transit where the ad valorem rate is highest.

Any structuring of foreign transactions should also take into account whether the particular means proposed will result in exposure to the

income tax jurisdiction of the foreign country. This in turn may depend not only on the internal law of that jurisdiction, but also on whether a tax treaty exists between the relevant jurisdictions and the limitations imposed by any such treaty on such tax in the absence of a "permanent establishment." The scope of the definition of a "permanent establishment" also requires examination in the event the exporter's contacts with the foreign jurisdiction cause the exporter to have such a "permanent establishment" in order to determine whether any exemption from income taxation under the internal laws of the foreign jurisdiction may be available.

27. Trademarks and Other Intellectual Property Concerns

Intellectual property registration is, of course, a matter upon which local counsel should be consulted; nevertheless, a number of general objectives can usefully be stated. First, intellectual property protection in the United States does not provide protection against intellectual property raiders anywhere else. Second, registration of intellectual property in the foreign country should be in the United States exporter's name so that he will remain the "owner" of the intellectual property should the need to change foreign representation ever arise (some jurisdictions may require user registrations). Third, all intellectual property rights should be registered before the first product is shipped. Fourth, the exporter should consider whether it would be more appropriate to deal with intellectual property protections in separate license agreements.[113] Fifth, the agreement should obligate the foreign representative to use only the trademark or service mark designated by the exporter in order to enhance the recognition of the product and build goodwill.

Representatives are generally required to protect and respect their exporter's intellectual property rights. Protective acts, including prosecutions of illegal use of the exporter's trademarks and other intellectual property, should be in the exporter's name (and always with his participation) so as to leave no doubt who owns the intellectual property. In exclusive representations, the foreign representative is usually required to bear the cost of prosecuting infringements, though the exporter usually bears the responsibility and costs of prosecuting infringements in nonexclusive territories. It is advisable to have a separate trademark license agreement with each representative to facilitate protection of the marks and, where necessary, to prosecute infringements.

113. The laws of many jurisdictions, such as the Andean Pact countries, require registration of intellectual property agreements, and such agreements must often be contained in separate documents.

Also, local laws do not always have a use requirement. Nevertheless, it is desirable to require a representative to use the trademark in connection with marketing the product to the exclusion of any other marks. This use will prevent concurrent use of any other trademark without specific permission.

Finally, it is generally advisable that the representative undertake to use the exporter's trademark or service mark (or any similar or potentially confusing marks) only in connection with sales of the exporter's goods. The agreement should prohibit the representative from incorporating the exporter's mark on its letterhead or in the company name. Generally, the agreement should reflect that the exporter retains total ownership of intellectual properties, permits, or licenses, the representative being entitled only to a limited use.

As a final note to this section, caution should be exercised in certain countries such as Mexico and the Andean Common Market countries where intellectual property rights relating to technology remain vested in the registrant for only a limited time period (generally five years) before they are deemed to have been transferred to the local representative or into the public domain.

28. Some Antitrust and Competition Law Issues[114]

Antitrust or competition law concerns arise in a number of jurisdictions in the western world. The European Economic Community,[115], Belgium,[116] Denmark,[117] Greece,[118] Ireland,[119] Netherlands,[120] Portugal,[121] Spain,[122] Sweden,[123] France,[124] West Germany,[125] the United King-

114. We do not here discuss the application of United States antitrust laws to international transactions. The issue remains controversial and is the subject of a literature too voluminous to treat properly in a survey article. The leading treatise in the field is J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d ed. 1981 with cumulative supplement updated through August 30, 1986).

115. Treaty of Rome, Mar. 25, 1957, art. 85, 297 U.N.T.S. 2, at 47-48; 1 & 2 Common Mkt. Rep. (CCH) ¶ 2005 (1978).

116. Law of May 27, 1960 (not vigorously enforced).

117. Act No. 102 of Mar. 31, 1955, *as amended.*

118. Law No. 703/1977.

119. Restrictive Practices Act, 1972.

120. Economic Competition Act of June 28, 1956, *as amended* June 29, 1977.

121. Decree Law No. 422/1983.

122. Law of July 20, 1963; Decrees of Mar. 4, 1965, and Feb. 5, 1970 (currently being reformed upon accession to EEC).

123. Competition Act (SFS 1982:79), entered into force on Jan. 1, 1983.

124. Law No. 85-1708 of Dec. 30, 1985; *see Doing Business in Europe,* Common Mkt. Rep. (CCH) ¶¶ 23,001-23,027 (1986).

125. *Id.* ¶¶ 23,501-23,529 (Act against Restraints of Competition) (1957), *as amended* (Germany has the most developed of the European competition laws).

dom,[126] Canada,[127] Japan,[128] and Australia,[129] all have antitrust laws of varying degrees and intensities.[130] Since economic effects are the focus of antitrust and competition laws, the type of foreign representation—agency as opposed to distributorship—is a secondary matter. In Europe, community law and national laws overlap and quite complex compliance issues can arise. Our discussion extends only to some important points of Community law.

In the EEC agents are not exempt from scrutiny, though no principal loses independence in the marketplace by virtue of the representation. Generally, however, the legal developments in this area have concerned distributorships. Under article 85(1) of the Treaty of Rome a distributor may be prevented from distributing competing goods and from actively soliciting business in another EEC country, but the distributor may not be forbidden from selling in that country.[131] "Absolute territorial protection" is not permitted, and an agreement must be prepared to permit parallel imports.[132]

126. *Id.* ¶¶ 24,001-24,030; Competition Act, 1980, c. 21; Restrictive Trade Practices Act, 1976, c. 34.

127. Competition Act, 1986, *reprinted in* 50 A.T.R.R. 1189 (1986). There is also significant provincial legislation.

128. Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Act. No. 54 (1947) (as amended).

129. Trade Practices Act, 1974 (Act No. 51) (as amended) (closely modeled on U.S. law).

130. Latin and South American nations exhibit less developed antitrust laws. *See, e.g.*, Cira, *Observations on Current Developments in Restrictive Business Practice Control Legislation in Latin America*, 16 REVUE SWISS DU DROIT INTERNATIONAL DE LA CONCURRENCE 29 (1982); White, *Recent Practices in Latin America*, 3 U.N. Doc. TD/B/C.2/AC.6/17 (1978).

131. Treaty of Rome, Mar. 25, 1957, 297 U.N.T.S. 2; EEC Reg. No. 1983/83, 26 O.J. EUR. COMM. (No. L 173) 1 (1983) (concerning distributorship agreements). The primary purpose of art. 85(1) of the Rome Treaty is to prohibit "the prevention, restriction or distortion of competition within the common market." The agreements, however, must affect trade and commerce between the member states to fall within the purview of art. 85(1). *See* Judgment of Jan. 22, 1965, Landgericht (District Court), Mannheim, W. Ger., for an examination of the requirements of art. 85(1). Such agreements may also include exclusive distribution agreements for the resale of goods within a particular member state when both parties to the agreement belong to that member state. While this arguably would occur only in exceptional cases, Reg. 1983/83 would protect such agreements from the provisions of art. 85(1) if the agreements affect trade between the member states and satisfy the other mandatory requirements of the regulation. *See* Recital 3 of Regulation 83/83. The same principal operates with respect to exclusive purchasing agreements under Reg. 1984/83.

132. Reg. 1983/83, art. 3(c). The distributor also may undertake the other express obligations set forth in Reg. 1983/83, art. 2(3). A continuing tug of war exists between the European Court of Justice and national courts on the permissibility of protections against parallel imports. *See, e.g.*, BUS. L. BRIEF (Financial Times), May 1984, at 12-13; BUS. L. BRIEF (Financial Times), May 1985, at 13-14; BUS L. BRIEF (Financial Times), Nov. 1985, at 3-5. For attempts by the EEC to harmonize the differing laws applicable to commercial agents (not applicable to distributors), see Proposal of Dec. 17. 1976, Council Directive to Coordinate the Laws of the Member States Relating to Commercial Agents, 20 O.J. EUR. COMM. (No. C 13) 2 (1977), *amended by* Proposal of Jan. 29, 1979, 22 O.J. EUR. COMM. (No. C 56) 5 (1979). Since the Directive is largely based on continental civil law concepts, the United Kingdom continues to oppose the Directive strongly.

EEC antitrust law distinguishes between exclusive distributorship arrangements[133] and exclusive purchasing arrangements.[134] Both types are given a "block exemption" from enforcement under article 85(1) in certain circumstances established by the Commission of the European Communities.[135]

Recently, the European Court of Justice took a hard line on territorial restrictions in "distribution franchises." In the *Pronuptia* case[136] the court struck down a franchise system that resulted in carving up of markets between franchisor and franchisees. The Commission has responded to the decision by commencing work on a block exemption for such franchises.

Most recently, the European Court of Justice has reinforced its opposition to restrictions on parallel imports. ETA, the Swiss Manufacturer of "Swatch" watches, sought to limit its product guarantee to watches sold by a distributor within its territory. Customers who bought a Swatch from a distributor for another territory were denied the guarantee. The Court struck down the limitation as a void market distorting mechanism.[137]

"Technical" standards may generally be imposed on a European representative without violating article 85. The exporter may require the distributor to offer after-sales service and technical expertise and to op-

133. EEC Comm. Reg. 1983/83 as of June 22, 1983 (on the application of art. 85(3) to exclusive distributorship agreements), 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 2 Common Mkt. Rep. (CCH) ¶ 2730 (1985) (replacing EEC Comm. Reg. 67/67). The focus of Reg. 1983/83 is clearly upon *inter*-brand competition.

134. EEC Comm. Reg. 1984/83 as of June 22, 1983 (on the application of art. 85(3) to categories of exclusive purchasing agreements), 26 O.J. EUR. COMM. (No. L 173) 5 (1983), 2 Common Mkt. Rep. (CCH) 2733 (1985). The focus of Reg. 1984/83 is clearly upon *intra*-brand competition.

135. EEC Commission Notice Concerning Regs. No. 1983/83 and No. 1984/83 (on the application of art. 85(3) to categories of exclusive distribution agreements and exclusive purchasing agreements), 26 O.J. EUR. COMM. (No. C 355) 7 (1983), *reprinted in* [1982-1985 Tranfer Binder] Common Mkt. Rep. (CCH) ¶ 10,548. Regulation 1983/83 applies only to the anticompetitive provisions of an exclusive distribution agreement. It exempts from art. 85(1) of the Treaty of Rome those arrangements between two "undertakings" (or economic entities) when one party provides goods for resale within the common market only to the other. Art. 1 of Reg. 1983/83. The exemption is available only in respect to agreements pursuant to which goods are resold or leased, and is not available where goods are consumed or incorporated into other products.

Certain restrictions may be imposed on either party to the exclusive distribution agreement or the exclusive purchasing agreement. These permissible restrictions are exhaustive; imposition of additional restrictions would result in loss of the benefit to be gained from either regulation. This is particularly so when the agreements limit the exclusive distributor or the exclusive reseller in his choice of customers or restrict his freedom to determine his prices and conditions of sale. *See* Recital 8 of both regulations.

136. Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard, 1986 E. Comm. Ct. J. Rep. 1, Common Mkt. Rep. (CCH) ¶ 14,245 (1986), *criticized in* BUS. L. BRIEF (Financial Times), Feb. 1986, at 5.

137. Common Mkt. Rep. (CCH) No. 558, at 1-3 (July 31, 1986).

erate in normal business hours,[138] but where service standards are used to prevent discounters negotiating for the distributorship, the standards will violate article 85(1), because they are in reality anticompetitive price floor restrictions.[139] For arrangements that impact less than five percent of a product market and anticipate sales of less than 200 million ECUs, the Commission's "de minimis" rule applies.[140]

The noncompetition provision should be carefully limited in time and scope so as not to be oppressive. An overly oppressive noncompetition clause will be disfavored by national courts and may result in an increase of termination damages.

29. Price Controls and Antidumping Problems

If all of the foregoing considerations to be kept in mind in formulating international representation agreements are not yet enough, the international lawyer must also consider the impact that local price controls may have on his client's business. Many developing countries have implemented such laws, often in response to pressures from the International Monetary Fund. Thus, the exporter must be most careful in establishing the initial pricing of his products, and often the popular unilateral price adjustments clause will not pass muster.[141] Antidumping laws of the local jurisdiction must also be taken into account.[142] Borrowing from the GATT, local laws generally prohibit the importation of goods at less than normal value. While the agreement itself is not an effective tool to deal with antidumping problems, the international lawyer should certainly address this concern with his client.

V. Conclusion

As can be seen from the foregoing discussion, even though an international representation agreement often is not approached with the same respect as a sexy international joint venture agreement, it deserves careful

138. Demo Studio Schmidt v. Commission, 1984 1 Comm. Mkt. L.R. 63 (1984).

139. AEG Telefunken A.G. v. Commission, 1 Comm. Mkt. L.R. 325 (1984); *see also* The Agreement of AEG-Telefunken, 25 O.J. Eur. Comm. (No. L 117) 15 (1982), *reprinted in* 2 Comm. Mkt. L.R. 386 (1982).

140. The Commission takes the view that, given the foregoing criteria, representation will not have an appreciable effect on competition and therefore will not violate art. 85(1). Notice on Agreements of Minor Importance, 50 O.J. Eur. Comm. (No. C 64) 1 (1970), *amended* Dec. 19, 1977. For the amended version, *see* Common Mkt. Rep. (CCH) ¶ 10,815.

141. United States agencies such as the office of the Trade Representative and the Department of Commerce can be very helpful in early identification of potential problems in this area.

142. Additionally, the United States exporter should allow for costs of import licensing in setting prices.

scrutiny, because a whole host of laws (including United States and foreign laws, as well as transnational treaties and conventions) and business considerations must be taken into account in order to maximize the client's hopes of achieving his long-term commercial objectives. While the United States counsel can (and clearly should) be most helpful in anticipating potential foreign legal and business concerns, the recommended use of competent local counsel cannot be overemphasized. Local customs and methods of doing business, valuable local contacts, and a continuing local independent source of information are key to the success of an international representation agreement. Competent local counsel can often constitute a valuable business asset in helping to build an exporter's overseas relationships. At the least, local counsel is necessary to advise on local laws and practices. Country-by-country analyses are essential because no two jurisdictions are the same.

The cornerstone of all international arrangements must be one of mutual trust in order to maximize the success of the undertaking; but all the trust in the world won't help before a tribunal asked to interpret a long forgotten and ignored written agreement. If a distributorship agreement is negotiated and signed, but the parties refer to the foreign representative as "their agent," and then begin to treat him as such, it would greatly surprise us if the tribunal asked to resolve a dispute would not also treat the representative as an agent, and accord him all of the protections the foreign agency law confers.

The mutual trust on which an international arrangement must be built is ephemeral when the contractual provisions are unreasonable and overreaching. Aside from the uncertainty as to validity and enforceability that such provisions create, they can cause irreparable harm to the mutual trust that the client has painstakingly sought to establish. Once a foreign representative has been unfavorably impacted by unreasonable provisions, it will be difficult for the parties to expect good faith as a guide in their continuing commercial relationship or, if disputes arise, to facilitate negotiations leading to settlement or resolution. The authors hope that this article will convince international lawyers to structure transactions in a reasonable and fair manner for the purpose of enhancing and facilitating their clients' long-term business objectives and creating some degree of heightened international goodwill, and to help maintain the ongoing viability of the structure established.

Appendix*

The Institute for Transnational Arbitration

SCOREBOARD
of
ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES (as of July 1, 1987)

N.Y. = UN Arbitration Convention of 1958.
ICSID = Convention on the Settlement of Investment Disputes of 1965.
MIGA = Convention Establishing the Multilateral Investment Guarantee Agency of 1985.
I/A = Inter-American Convention on International Commercial Arbitration of 1975.
USBIT = U.S. Bilateral Investment Treaties.
OPIC = Agreements supporting programs of U.S. Overseas Private Investment Corporation.

Symbols for adherence status are explained at end of table.

Changes since April 1, 1987:
Turkey signed ICSID Convention on June 24, 1987.
Two countries signed MIGA Convention: Madagascar on May 27, 1987 and Sweden on April 2, 1987.
Two countries ratified MIGA Convention: Japan on June 5, 1987 and Malawi on May 14, 1987.
Bahrain ratified OPIC.

Nation	N.Y.	ICSID	MIGA[1]	I/A	USBIT[2]	OPIC
Afghanistan						IO
Albania						
Algeria						NP
Andorra						
Angola						
Anguilla[3]	R	R	S			R
Antigua and Barbuda					NP	R
Argentina	S					R
Aruba[4]	R	R	S			R
Australia	R	S				
Austria	R	R				IO
Bahamas						R
Bahrain			R			R
Bangladesh		R	R		S	R
Barbados		R	R			R
Belgium	R	R				IO
Belize		S				R
Benin	R	R	S			R
Bhutan						
Bolivia			S			R
Botswana	R	R				R
Brazil				S		R
Brunei						NP
Bulgaria	R					
Burkina Faso	R	R				R
Burma						
Burundi		R			NP	R
Byelorussian SSR	R					
Cambodia (Kampuchea)	R					
Cameroon		R			S	R
Canada	R		S*			
Cape Verde						R
Central African Republic	R	R				R
Chad		R				R
Chile	R		S	R		R
China (People's Republic)	R				NP	R
Colombia	R		S	R		R

*Reprinted with the permission of The Institute for Transnational Arbitration, a division of The Southwestern Legal Foundation.

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Comoros		R				
Congo		R				R
Cook Islands[5]						R
Costa Rica	S	S		R	NP	R
Cuba	R					IO
Cyprus	R	R	R			R
Czechoslovakia	R					
Denmark	R	R	S*			IO
Djibouti	R					R
Dominica						R
Dominican Republic						R
Ecuador	R	R	R	S		R
Egypt	R	R	S		S	R
El Salvador	S	R		R		R
Equatorial Guinea			S			R
Ethiopia		S				R
Fiji		R	S			R
Finland	R	R				IO
France	R	R	S*			IO
French Guiana[6]	R	R	S			R
Gabon		R			NP	R
Gambia		R				R
German Democratic Republic	R					
Germany, Federal Republic	R	R	S*			IO
Ghana	R	R	S			R
Greece	R	R	S			R
Grenada			S		S	R
Guatemala	R			R		R
Guinea		R				R
Guinea-Bissau						R
Guyana		R				R
Haiti	R	S			S	R
Holy See (Vatican City)	R					
Honduras		S		R	NP	R
Hungary	R	R	S			
Iceland		R				
India	R					R
Indonesia	R	R	R		NP	R
Iran						IO
Iraq						NP
Ireland	R	R	S*			IO
Israel	R	R				R
Italy	R	R	S*			IO
Ivory Coast		R	S			R
Jamaica		R	S			R
Japan	R	R	R*			
Jordan	R	R	R			R
Kenya		R				R
Kiribati						NP

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Korea (Democratic People's Republic)						
Korea (Republic)	R	R	S			R
Kuwait	R	R	S			NP
Laos						IO
Lebanon						R
Lesotho		R	R			R
Liberia		R				R
Libya						
Liechtenstein						
Luxembourg	R	R				IO
Madagascar	R	R	S			R
Malawi		R	R			R
Malaysia	R	R			NP	R
Maldives						NP
Mali		R				R
Malta			S			R
Mauritania		R				R
Mauritius		R				R
Mexico	R			R		
Monaco	R					
Mongolia						
Morocco	R	R	S		S	R
Mozambique						R
Nauru						
Nepal		R				R
Netherlands	R	R	S*			IO
Netherlands Antilles[7]	R	R	S			R
New Zealand	R	R				
Nicaragua				S		R
Niger	R	R				R
Nigeria	R	R	S			R
Norway	R	R				IO
Oman						R
Pakistan	S	R	R			R
Panama	R			R	S	R
Papua New Guinea		R				R
Paraguay		R		R		R
Peru						IO
Philippines	R	R	S			R
Poland	R					
Portugal		R				R
Qatar						R
Romania	R	R				R
Rwanda		R			NP	R
St. Christopher & Nevis			S			R
St. Lucia		R	S			R
St. Vincent & Grenadines						R
San Marino	R					
Sao Tome e Principe						R

Nation	N.Y.	ICSID	MIGA	I/A	USBIT	OPIC
Saudi Arabia		R	R			R
Senegal		R	R		S	R
Seychelles		R				
Sierra Leone		R	S			R
Singapore	R	R				R
Solomon Islands		R				NP
Somalia		R				R
South Africa	R					
Spain	R					IO
Sri Lanka	R	R	S		NP	R
Sudan		R	S			R
Suriname						NP
Swaziland		R				R
Sweden	R	R	S*			
Switzerland	R	R	S*			
Syria	R					R
Taiwan						R
Tanzania	R					R
Thailand	R	S				R
Togo		R	S			R
Tonga						R
Trinidad and Tobago	R	R				R
Tunisia	R	R	S			R
Turkey		S	S		S	R
Tuvalu						NP
Uganda		R				R
Ukranian SSR	R					
Union of Soviet Socialist Republics	R					
United Arab Emirates		R				NP
United Kingdom	R	R	S*			IO
United States of America	R	R	S*	S	N/A	N/A
Uruguay	R		S	R	NP	R
Vanuatu			S			
Venezuela				R		IO
Vietnam						IO
Western Samoa		R	R			R
Yemen Arab Republic			S			R
Yemen, People's Democratic Republic						
Yugoslavia	R	R				R
Zaire		R	S		S	R
Zambia		R	S			R
Zimbabwe						NP

Notes: (1) Not in force. Enters into force upon ratification ("R") by five capital-exporting and fifteen capital-importing countries if total subscriptions amount to at least one-third of MIGA's capital. Asterisk (*) after symbol indicates capital-exporting country per Schedule A to the Convention. (2) A bilateral investment treaty will be listed as being ratified only when it has been ratified by both signatories. (3) Dependency of United Kingdom. (4) Autonomous part of the Netherlands. (5) Under New Zealand sovereignty. (6) Overseas Department of France. (7) Autonomous part of the Netherlands.

Symbols:

S: Signed but not ratified
R: Ratified or acceded
NP: Negotiations pending
IO: Inoperable
N/A: Not applicable

Sources:

N&N from ITA, July 1986; **Bulletin** of the U.S. Department of State, May 1986 to May 1987; telegram of July 6, 1987, from Dr. Gerold Herrmann, UN Office of Legal Affairs in Vienna; and interviews June 29 to July 10, 1987, with Dr. Christina Hoedemaker, Mr. Paul Levine and Mr. Antonio Parra, World Bank; Ms. Lois Allder and Mr. John Zylman, Treaty Affairs, Office of the Legal Adviser, U.S. Department of State; Mrs. Eliana P. Vela, Treaty Officer, Organization of American States; and Mr. Lorin Weisenfeld, Overseas Private Investment Corporation.